

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



79

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Number 24,242

---

UNITED STATES OF AMERICA

Appellee

-v-

JAMES E. CURTIS

Appellant

APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

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BRIEF FOR APPELLANT

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United States Court of Appeals  
for the District of Columbia Circuit

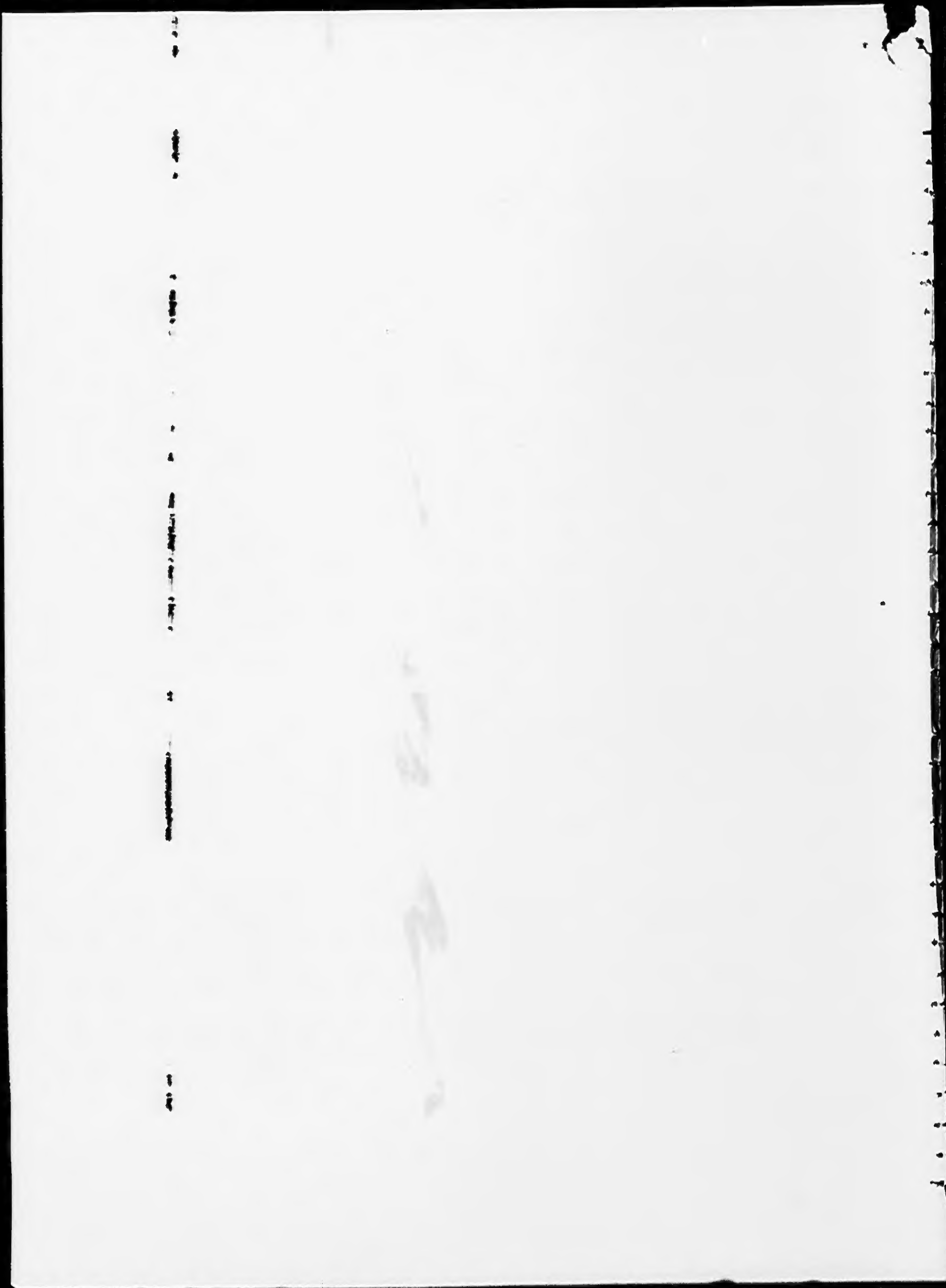
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AN UNEXPLAINED DELAY OF EIGHT DAYS BETWEEN ISSUANCE AND EXECUTION OF A SEARCH WARRANT, ABSENT A SHOWING OF PREJUDICE, VIOLATES THE "FORTHWITH" COMMAND OF RULE 41 (c), <u>FEDERAL RULES OF CRIMINAL</u> <u>PROCEDURE MAKING THE SEARCH ILLEGAL</u> .....	6
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### APPENDIX A

STATEMENT OF ISSUE \*

Does an unexplained delay of eight days between issuance and execution of a search warrant vitiate that search warrant and render the search of appellant's premises illegal if appellant makes no showing of prejudice attributable to that delay?

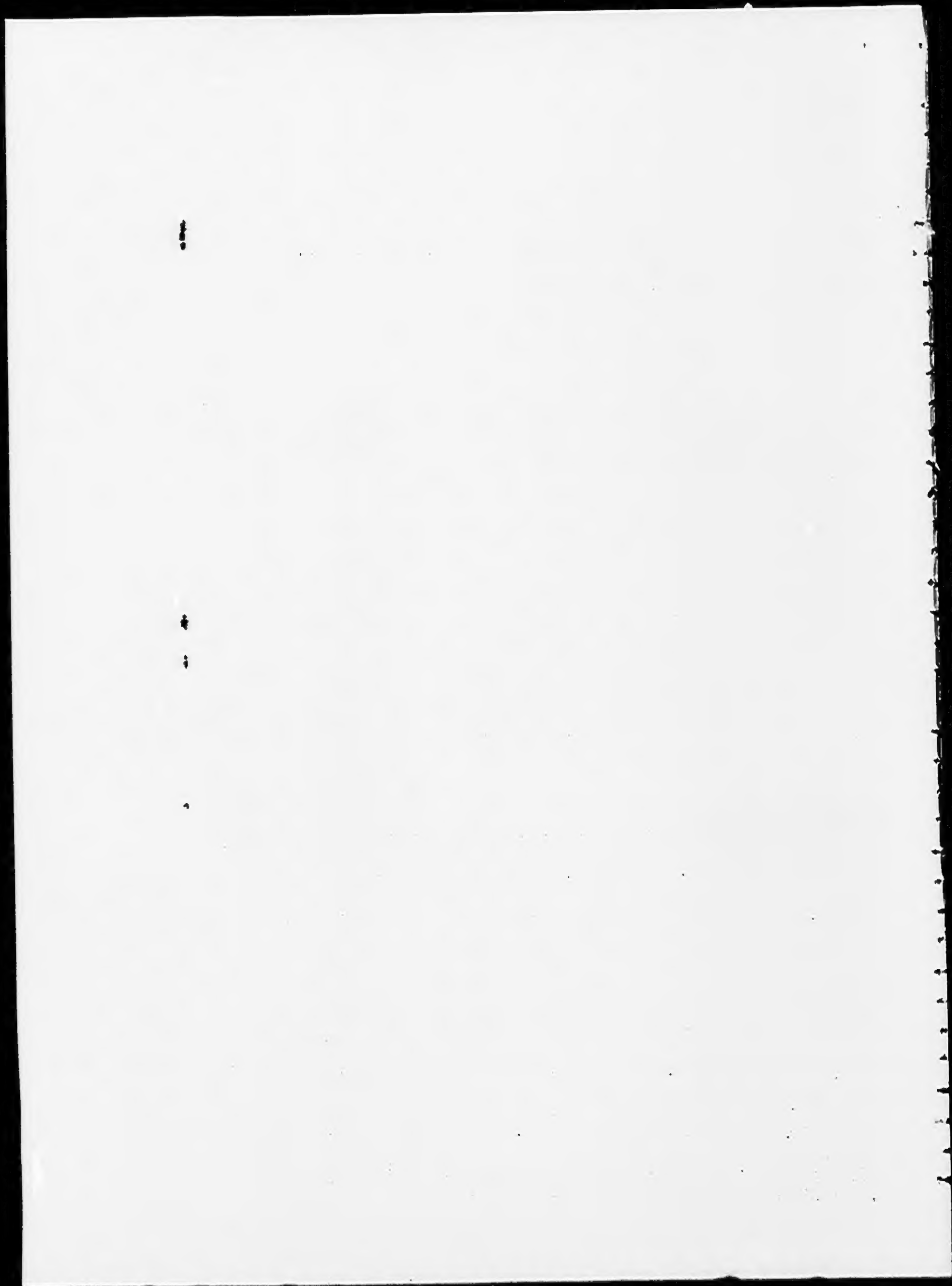
\* This case has not been before this Court on any previous occasions.

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REFERENCES TO RULINGS

## I.

On March 28, 1969, Judge Tim Murphy denied appellant's motion to suppress tangible evidence (Tr.A.28).

## II.

On April 10, 1969, Judge John S. Malloy denied appellant's renewed motion to suppress tangible evidence (Tr.C.4).

## III

On April 7, 1970, the District of Columbia Court of Appeals upheld the trial court's denial of the motion to suppress tangible evidence. Curtis v. United States, 263 A.2d 653 (D.C.App. 1970).



UNITED STATES COURT OF APPEALS  
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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

I. Proceedings

Appellant, James E. Curtis, was arrested on February 27, 1969, during the execution of a United States Commissioner's search warrant. Appellant was arraigned in the District of Columbia Court of General Sessions on February 28, 1969 on charges of Possession of the Implements of Crime, in violation of 22 D.C. Code, Section 3601, and Unlawful Possession of a Pistol, in violation of 22 D.C. Code, Section 3203. A combined Motion to Suppress Evidence and to Dismiss the Information was heard pre-trial by the Honorable Tim Murphy and

denied. The motion was renewed on April 10, 1969 at the jury trial before the Honorable John J. Malloy who adhered to the pre-trial ruling without further argument. At the conclusion of the government's case in chief, Judge Malloy granted a Motion for Judgment of Acquittal on the charge of Possession of Implements of Crime. After all of the evidence was presented, the jury found the Appellant guilty of Unlawful Possession of a Pistol. Appellant was sentenced to 360 days imprisonment.

A timely appeal was filed in the District of Columbia Court of Appeals. Although the appellant raised three distinct issues dealing with the execution of the search warrant, the court dealt only with the issue of delay between the issuance and execution of the search warrant. The court affirmed the conviction holding that

The officer who obtained the warrant in this case, when asked the reason for the delay, said that he serves his warrants in order as he gets them, more or less, and that he took the instant warrant in sequence with the other police duties he had to perform. This sparse testimony hardly amounts to the requisite showing of "reasonableness in point of time", yet we do not remand the case for further hearing for, as House suggests, whether or not there was sufficient compliance with the statute may turn on a showing of prejudice. We take this language to mean that even assuming an unreasonable time lag in the execution of the warrant, there must, in addition, be a showing of measurable prejudice to appellant resulting from the delay. No such showing was made in this case, although appellant was not precluded by trial court from demonstrating the prejudicial effect of delay in execution of the warrant.

Appellant argues that the delay is prejudicial as a matter of law, but we have held that delay, standing alone, does not vitiate the warrant. Johnson v. United States, ...

(footnote omitted) Curtis v. United States, 263 A.2d 653, 655 (D.C. App. 1970).

A timely Petition for Allowance of an Appeal was filed with this Court. The brief filed in support of the Petition presented only the issue relating to the timeliness of the execution of the search warrant. By Order dated July 2, 1970, this Court granted leave to appeal the decision rendered by the District of Columbia Court of Appeals.

## II. Statement of Facts

### A. The Search

On February 17, 1969, a "buy" of marijuana was arranged by Officer James Reed of the Metropolitan Police Department. A confidential informer went to 1212 Maplevue Place, S.E. and allegedly purchased a quantity of marijuana from a "Cal" Curtis. Two days later, on February 19, 1969, Officer Reed obtained a United States Commissioner's search warrant which directed the police to search forthwith at any time in the day or night the entire premises of 1212 Maplevue Place, S.E., Apartment 103, for marijuana, narcotics, and narcotics paraphernalia.

On the evening of February 27, 1969, at 11:15 P.M., eight days and nights after its issuance and ten days after the alleged sale, the search warrant was executed. After entering the outer security door of the building with a key, proceeding down the hall to apartment 103, and announcing their authority and purpose, the officers

broke into the apartment (Tr.A.18-22).<sup>1/</sup> The officers then proceeded through the unlighted apartment to the bedroom where, after a thorough search, Officer Parker seized a .22 caliber colt pistol and a water pipe. Nothing else was seized in the apartment. Mr. Curtis, the petitioner, who at the time of the forcible entry was by the bed or in it with his girlfriend, both of whom were nude, was arrested and charged with Possession of Implements of Crime (narcotics paraphernalia), in violation of 22 D.C. Code, Section 3601, and Unlawful Possession of a Pistol, in violation of 22 D.C. Code, Section 3203.

B. Suppression Hearing (March 28, 1970)

One of the grounds urged in support of the Motion to Suppress<sup>2/</sup> was that the delay of eight days in executing the search warrant vitiated that warrant. At the suppression hearing, Officer Reed when questioned by defense counsel regarding the delay in the execution of the warrant stated as follows:

Q. This [search] was February 27th at around 11:15 p.m.

A. That is correct.

<sup>1/</sup> Hereinafter, the transcript of the Motion to Suppress on March 28, 1969 will be designated (Tr.A.). The transcript of the renewal of the Motion on April 9 will be designated (Tr.B.) and the transcript of the trial on April 10 will be designated (Tr.C.). Any other part of the record will be referred to as (R.).

<sup>2/</sup> The other grounds urged were: (1) the affidavit on which the nighttime warrant was issued contained no positive statement that the property was in the place to be searched; (2) the lack of particularity in the warrant prevented seizure of the gun; and (3) a violation of 18 U.S.C., Section 3109 made the search illegal.

Q. You, I believe, obtained a search warrant on February 19th after this alleged sale on February 17th?

A. That is correct.

Q. Why did you wait ten days after the sale and eight days after the warrant was issued to use this warrant to search this premises?

A. Why?

Q. Why?

A. In the course of police work we have other things to do. I serve them in order as I get them, more or less.

Q. So you just put it off as a routine thing?

A. No! I didn't put it off. I take it in sequence. I've got my other duties (Tr.A.24-25).

No evidence was introduced by the government to further explain the cause of the eight day delay in the execution of the search warrant. The motion was denied.

C. The Trial<sup>3/</sup>

Counsel for appellant renewed the motion to suppress evidence at the outset of the trial on April 10, 1969. Judge Malloy, relying on the ruling of Judge Murphy, denied that motion without a hearing or argument on the motion (Tr.C.4). The Government elicited testimony from two police officers who executed the warrant between 11:00 p.m. and 12:00 p.m. on the evening of February 27, 1969, as to the circumstances of the search and the items found on the premises (Tr.C.7,23). After defense counsel's motion for judgment of acquittal was granted

<sup>3/</sup> On April 9, 1969, Judge Murphy heard further testimony concerning possible violation of 18 U.S.C., Section 3109. No testimony was introduced concerning the delay in execution of the search warrant.

as to the count of possession of implements of crime (Tr.C.35), the defense presented its case concerning the unlawful possession of the pistol. (Tr.C.36-72). The appellant testified that the gun had never been on the premises, but the police had nevertheless charged him with possessing the weapon (Tr.C.48-50). The jury returned a verdict of guilty (Tr.C.80) and appellant was sentenced to serve 360 days (Tr.C.81).

ARGUMENT

AN UNEXPLAINED DELAY OF EIGHT DAYS BETWEEN ISSUANCE AND EXECUTION OF A SEARCH, ABSENT A SHOWING OF PREJUDICE, VIOLATES THE "FORTHWITH" COMMAND OF RULE 41(c), FEDERAL RULES OF CRIMINAL PROCEDURE MAKING THE SEARCH ILLEGAL.

A. The Search Warrant

Rule 41(c) of the Federal Rules of Criminal Procedure provides, in part, "it [the search warrant] shall command the officer to search forthwith the person or place named for the property specified." Section (d) of rule 41 provides that "the warrant may be executed and returned only within 10 days after its date."<sup>4/</sup>

In accordance with those provisions <sup>The</sup> of United States Commissioner's warrant in the instant case stated on its face: "You are hereby commanded to search forthwith the place named and if the property be found there to seize it ... and return this warrant and bring the property before me within ten days of this date, as required by law."

<sup>4/</sup> The warrant, having been issued by a United States Commissioner for a federal narcotics violation (26 U.S.C., Section 4742(a)), was issued pursuant to Rule 41. The District of Columbia Code provisions dealing with narcotics warrants, 33 D.C. Code, Section 414 are nearly identical to Rule 41. Section 414(e) directs issuance of a search warrant to the Metropolitan Police Department "commanding him forthwith to search the place named for the property specified." Section 414(i) provides that "[a] search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its issuance; after the expiration of this time the warrant, unless executed, is void."

(emphasis in original).<sup>5/</sup> In this case the search warrant was executed during the evening eight days after it had been issued by the Commissioner.<sup>6/</sup> The only explanation offered by the Government for the delay was that "In the course of police work we have other things to do. I serve them in order as I get them, more or less." (Tr.A.24-2:

Case law in this jurisdiction makes it perfectly clear that a search warrant may not be executed and returned beyond the tenth day of its issuance, and that a warrant executed within that period may nevertheless be defective because it was not executed "forthwith."<sup>7/</sup>

The test for what constitutes "forthwith" at this time however is far from clear. The opinion in House v. United States, supra,<sup>8/</sup> has been read by the District Court Judge to whom it was remanded<sup>8/</sup> and by the District of Columbia Court of Appeals in the instant case<sup>9/</sup>, and in Johnson v. United States,<sup>10/</sup> as establishing a two-step test to deter-

<sup>5/</sup> The warrant appears to be on a printed form which only requires the entry of the person or premises to be searched and the items to be seized. Form A.0.93 (Revised June 1964).

<sup>6/</sup> The warrant was issued two days after an alleged marijuana transfer at the premises ordered searched. Pursuant to the provisions of 18 U.S.C., Section 1405 the warrant authorized a nighttime search absent a showing of positivity.

<sup>7/</sup> House v. United States, 134 U.S.App.D.C. 10, 411 F.2d 725 (1969), cert. denied, U.S. (1970); Mitchell v. United States, 103 U.S.App.D.C. 341, 258 F.2d 435 (1958) (concurring opinion of Judge Bazelon).

<sup>8/</sup> United States v. House, Crim. No. 827-66 (D.C.D.C. Dec. 22, 1969) Judge Gasch. Copy attached as Appendix A.

<sup>9/</sup> Curtis v. United States, 263 A.2d 653 (D.C.App. 1970).

<sup>10/</sup> 255 A.2d 494 (D.C.App. 1969).

mine whether the warrant was executed "forthwith." Step one requires the Government to prove that the search warrant was executed within a reasonable period of time under the circumstances. Step two requires the defendant to prove, even if the search warrant was not reasonably served, that he was prejudiced by the delay in execution. Failure of the defendant to prove prejudice would require the court to find that the warrant had been executed in a timely manner. In the instant case the District of Columbia Court of Appeals ruled that the warrant had not been executed within a reasonable period of time, but affirmed the trial court decision on the ground that the defendant had not established prejudice.<sup>11/</sup>

An analysis of Rule 41(c), its legislative history, the statutes and cases from which the provision was derived, the case law in this and other jurisdictions concerning this rule and similar state rules, as well as the general development of the law in the Fourth Amendment area, will be undertaken in order to illustrate beyond question that the House formulation, if indeed it establishes a two-step test, is in error. It therefore follows that the District of Columbia Court of Appeals two-step test formulation is incorrect and the opinion rendered in this case is in error and must be reversed.

#### B. Statutory Background

The ancestry of Rule 41(c) and early state case law confirms the

<sup>11/</sup> Supra note 9 at 655. The court recognized that defendant - who claimed he was being framed by the police - claimed no knowledge of the weapon. n.7 at 655. Under these circumstances how was he to show prejudice?

proposition that the "forthwith" execution provision was an integral part of the scheme for executing search warrants, and not "a belated echo of a medieval royal command."<sup>12/</sup> Rule 41, Federal Rules of Criminal Procedure, remains indetical to the provision first formulated by the Supreme Court of the United States, and adopted by Congress to take effect on March 21, 1946.<sup>13/</sup> Rule 41(c) requiring "forthwith" execution and Rule 41(d) requiring execution and return of the search warrant within ten days, were not unique to federal or state criminal procedure. These two provisions first appeared in federal law in Title XI of the Espionage Act of 1917,<sup>14/</sup> and were later incorporated by reference in the National Prohibition Act.<sup>15/</sup> Neither the notes of the Advisory Committee, nor the legislative history of the Espionage Act provides a guide as to the meaning, interplay, or differences between the provisions. However, the legislative history of the Espionage Act of 1917 indicates that Title XI was derived from the 1881 Code of Criminal Procedure of the State of New York.<sup>16/</sup> Section 796 of that code "command[ed] him [the policeman] forthwith

<sup>12/</sup> United States v. Dunnings, 425 F.2d 836, 841 (2d Cir. 1969).

<sup>13/</sup> 327 U.S. 821; Cong. Rec., Vol.91, pt.1, p.17; Exec. Comm. 4; H. Doc. 12, 79th Cong. (1946)

<sup>14/</sup> Act of June 15, 1917, ch.30, Title XI Sections 6,11; 40 Stat. 229

<sup>15/</sup> Act of Oct. 28, 1919, ch.85, Title II, Section 18, 41 Stat. 313.

<sup>16/</sup> "The new title (XI) as presented by the conference was based upon New York law on this subject, and follows generally the policy of that law ... ."

to search the person or place named ... ."<sup>17/</sup> While Section 802 required that a search warrant must be executed and returned ... if issued in the City or County of New York, within 5 days after its date, and if in any other county, within 10 days... ."<sup>18/</sup> It was so important that search warrants be executed properly that the officer charged with executing a warrant could be criminally prosecuted for improper service.<sup>19/</sup>

The provision in the New York statute recognizing that the maximum period of time for execution and return of search warrants should vary with the complexity and distance involved in execution, was done away with in Section XI without explanation.<sup>20/</sup> So too were the criminal penalties for improper service. Although no New York cases deal with the conflict, if any, between the "forthwith" and ten-day provisions, numerous state decisions sought to define the term "forthwith", and supply the reason for the importance of prompt execution of search warrants.

<sup>17/</sup> 1881 Code of Criminal Procedure for State of New York, Section 716.

<sup>18/</sup> 1881 Code of Criminal Procedure for State of New York, Section 802.

<sup>19/</sup> Section 814 of 1881 Criminal Code and Section 120 of New York Penal Code.

<sup>20/</sup> The January, 1970 Preliminary Draft of Proposed Amendments to FED.R.CRIM.P. proposes modification of Rule 41(c) requiring the magistrate to specify the numbers of hours within which the search must occur, up to ten days. This would substitute the uncertain forthwith language for specific time limits.

C. "Forthwith": State Analysis

An overwhelming number of state opinions have held that search warrants must be executed promptly.<sup>21/</sup> Those cases which interpreted the term "forthwith," as it appeared either in a statute or on the face of a warrant, uniformly ruled that "forthwith" meant within a "reasonable" period of time.<sup>22/</sup> Similarly, cases which interpreted phrases such as "immediately proceed to execute,"<sup>23/</sup> or make immediate return of said warrant"<sup>24/</sup> looked to the reasonableness of the time period. So too did cases which upheld long delays.<sup>25/</sup> No state opinion has ever required, or even hinted at the requirement, that prejudice must be established by the defendant in order to invalidate an untimely executed search warrant.

State v. Guthrie<sup>26/</sup> is the earliest and most comprehensive of the state opinions dealing with "timely" execution of search warrants. The reasoning of the decision has been approved and quoted in nearly every subsequent opinion on the issue. In Guthrie, the statute commanded

<sup>21/</sup> See infra n.21-25.

<sup>22/</sup> See, e.g. McDaniel v. State, 197 Ind. 179, 150 N.E. 50 (1926); People v. Wiedeman, 324 Ill. 66, 154 N.E. 432 (1926); State v. Pachesa, 102 W.Va. 607, 135 S.E. 908 (1926); State v. Perkins, 220 Mo. 349, 285 S.W. 1021 (1926); People v. Fetsko, 332 Ill. 110, 163 N.E. 359 (1928); State v. Miller, 329 Mo. 855, 46 S.W. 2d 541 (1932).

<sup>23/</sup> Link v. Commonwealth, 199 Ky. 778, 251 S.W. 1016 (1923).

<sup>24/</sup> State v. Guthrie, 99 Me. 448, 38 A. 368 (1897).

<sup>25/</sup> See e.g. Farmer v. Sellers, 89 S.C. 492, 72 S.E. 224 (1911); State v. John, 103 W.Va. 148, 136 S.E. 842 (1927).

<sup>26/</sup> Supra, at note 24.

"immediate return of said warrant" and "forthwith" presentation of the defendant for trial, without specifying the time limit for execution of the search warrant. The Court held that under the circumstances a three day delay in execution of the warrant was unreasonable and made the warrant invalid - functus officio. The Court in Guthrie recognized that a search warrant "is a sharp and heavy police weapon"<sup>27/</sup> which required constitutional safeguards to curb potential abuses. Further, the court made it plain that a search warrant speaks only to existing violations of the law, can never be obtained in anticipation of future criminal activity, and commands seizure of contraband existing at the time of the warrant's issuance, not contraband which might come into existence at some future time. Based on that reasoning and the proposition that "ministerial officers seeking to execute a statute or process upon the property or person of a citizen shall execute it promptly, fully, and precisely,"<sup>28/</sup> the court ruled that the police had to execute the search warrant within a "reasonable time" after its issuance. The court defined "reasonable time" to mean

The time he may take - the reasonable time - neces-

<sup>27/</sup> Id. 38A.at 369

<sup>28/</sup> Id.

sarily varies with the circumstances. The hour in the day of making the complaint, the distance of the place to be searched, the state of the weather, the condition of the roads, the lack of facilities for travel, the obstructions met, and other circumstances may make a long-delayed service practically immediate and forthwith, and hence within a reasonable time. <sup>29/</sup>

The Maine Court held that once it is found that the delay is unreasonable the warrant is void and the evidence seized must be suppressed. The holding would not support the theory, that a defendant must show that he was prejudiced by the delay.

Numerous cases decided in the 1920's and 1930's follow the rationale of Guthrie and uniformly rule that a search warrant is void unless executed promptly under the circumstances. Police discretion in the manner, time, and place of service was not tolerated.

In People v. Wiedeman,<sup>30/</sup> the Illinois Supreme Court ruled that a warrant executed six days after its issuance was not executed "forthwith." Forthwith execution was held to require "immediate execution" or "prompt execution." Recognizing that "every hours delay, whether caused by the officer's inefficiency, or some other factor, endangers the success of the prosecution."<sup>31/</sup> Two years later the Illinois Supreme Court ruled that a search warrant executed ten days after issuance was not executed "forthwith." "The nature of a search warra requires that when issued it shall be promptly executed." People v.

<sup>29/</sup> Id.

<sup>30/</sup> 324 Ill. 66, 154 N.E. 432 (1926).

<sup>31/</sup> Id. 154 N.E. at 433.

Fetsko.<sup>32/</sup>

In State v. Perkins,<sup>33/</sup> the Missouri Supreme Court ruled that a search warrant issued and executed eight days after the affidavit had been delivered to the magistrate was void. The court held that a search warrant was to be served "forthwith" as "the whole tenor of the statute seems to contemplate immediate action."<sup>34/</sup> Six years later the Missouri Supreme Court invalidated a search warrant which was executed twelve days after issuance on the ground that the statutory "forthwith" requirement, meant execution with "reasonable promptness."

State v. Miller.<sup>35/</sup>

In McDaniel v. State,<sup>36/</sup> the police returned to the premises four successive days. Holding that such a procedure was improper the court stated that "under such a statute as ours an officer charged with the execution of a search warrant has no discretion, but must proceed with diligence at the earliest reasonable opportunity, to make the search as commanded."<sup>37/</sup>

Several other cases dealing with execution of search warrants re-

<sup>32/</sup> People v. Fetsko, 332 Ill. 110, 163 N.W. 359, 360 (1928).

<sup>33/</sup> 220 Mo. 349, 285 S.W. 1021 (1926).

<sup>34/</sup> Id. 285 S.W. at 1023.

<sup>35/</sup> 329 Mo. 855, 46 S.W. 2d 541 (1932).

<sup>36/</sup> 197 Ind. 179, 150 N.E. 50 (1926).

<sup>37/</sup> Id. 150 N.E. at 53.

quired that they be executed within a reasonable period of time.<sup>38/</sup> Recent state opinions continue to require prompt execution of search warrants.<sup>39/</sup> In State v. Ferrigno,<sup>40/</sup> a 1969 decision, the court held that a fourteen day delay voided a warrant where the statute required reasonably prompt execution. The court specifically disapproved of the practice of withholding execution until a time when the police feel the most can be gained.

"Search warrants must be executed with reasonable promptness and not at the unlimited discretion of the officers whose duty it is to service them ...

[t]he very nature of the search warrant indicates that when complaint is made the warrant, if issued at all, should be promptly issued and executed. The purpose is to seize the property alleged to be at that time in the place to be searched to prevent its removal or further concealment. <sup>41/</sup>

The state courts have consistently required that search warrants be executed promptly within a reasonable period of time. Failure by the police to so execute made the warrant void. Notwithstanding the limited communication and transportation facilities available to law

<sup>38/</sup> Farmer v. Sellers, 89 S.C. 492, 72 S.E. 224 (1911); Link v. Commonwealth, 199 Ky. 778, 251 S.W. 1016 (1923); People v. Chippewa Circuit Judge, 226 Mich. 326, 197 N.W. 539 (1924); State v. Pachesa, 102 W.Va. 607, 135 S.E. 908 (1926); Hiller v. State, 190 Wisc. 369, 208 N.W. 260 (1926); State v. John, 103 W.Va. 148, 136 S.E. 842 (1927).

<sup>39/</sup> Simmons v. State, (Okla. Crim. Ct. of App.) 286 P.2d 296 (1955); State v. Cesero, 146 Conn. 375, 151 A.2d 338 (1959).

<sup>40/</sup> (Cir. Ct. of Conn.) 256 A.2d 795 (1969).

<sup>41/</sup> Id. at 796-7.

enforcement agencies, as compared with modern equipment, unexplained delays in execution of three to six days were found to be unreasonable. This approach has been followed by state courts because search warrants speak only to existing law violations - not future violations - and require the authorities to perform a ministerial function which permits no discretion. Failure of prompt execution may subject citizens to an oppressive tool in the hands of the authorities, permit removal or continued concealment of the property in question and lead to seizure of items not in existence at the time of the warrant's issuance. Delay in execution is countenanced only when weather, distance, or lack of facilities for travel create the delay. Intentional delay for whatever reason is not permitted. This approach quite obviously does not require a defendant to establish that he was prejudiced by the delay in order to have the warrant declared void. Rather, the burden is on the government to establish "forthwith execution;" failure to do so makes the warrant functus officio.

D. "Forthwith": Other Circuits' Analysis

Few federal decisions have been found which define the term "forthwith" as used in Rule 41(c). In each of the cases the court has been struggling to reconcile the ten-day provision in Rule 41(d) with the "forthwith" command of Rule 41(c). Although the four circuits which have dealt with the issue have adopted different approaches, each has held that the ten-day provision in Rule 41(d) sets the outer limit for execution of warrants and that a search warrant executed within that

period may nevertheless be defective for want of forthwith execution.<sup>42/</sup>  
In Spinelli v. United States,<sup>43/</sup> federal officers "staked-out" the premises in question for two hours and ten minutes prior to executing the search warrant. Spinelli contended that such a delay was not a "forthwith" search as required by Rule 41(c). The court in holding that a search warrant is executed "forthwith" if it is executed within a reasonable time after its issuance not exceeding ten days, recognized that

A warrant is issued upon allegations of presently existing facts, and as such does not allow execution at the leisure of the police, nor does it invest the police officers with the discretion to execute the warrant at any time within ten days believed by them to be the most advantageous.  
Mitchell v. United States ... (concurring opinion. <sup>44/</sup>

The court then established the following rule:

To object to the failure of the police to "search forthwith" the complaining party must point to

<sup>42/</sup> "Hence, we adopt the view of every court that has been directly presented with the problem and hold that the ten-day period merely sets the maximum under the Rule, and the requirement of execution "forthwith," depending on the circumstances of each case, may require execution in something less than ten days." (Citations omitted) United States v. Nepstead, 424 F.2d 269, 271 (9th Cir. 1970). See also Spinelli v. United States, 382 F.2d 871 (8th Cir. 1967), rev'd on other grounds 393 U.S. 410 (1969); House v. United States, 134 U.S.App.D.C. 10, 411 F.2d 725 (1969), cert. denied, \_\_\_ U.S. \_\_\_ (1970); United States v. Dunnings, 425 F.2d 836 (2d Cir. 1969). See contra Murby v. United States, 2 F.2d 56 (1st Cir. 1924).

<sup>43/</sup> 382 F.2d 871 (8th Cir. 1967), rev'd on other grounds, 393 U.S. 410 (1969).

<sup>44/</sup> Id. 382 F.2d at 885.

some definite legal prejudice attributable to this unjustified delay. The fact that the search uncovered prejudicial evidence does not invest standing unless the presence of the evidence is attributable to the delay. Unjustified attempts by the police to prejudice the suspect by delay in execution do not provide standing unless the police are successful in their efforts. ... 45/

In United States v. Dunnings<sup>46/</sup> the search warrant was executed nine days after its issuance. The reason for the delay was attributable to the narcotic agent's information that the premises was used by Dunning only to repackage the heroin and that to be sure the heroin was present Dunnings had to be present. Concluding that "[i]t is by no means clear that the forthwith phrase in Rule 41(c) is a determination of an important policy rather than a belated echo of a medieval royal command ... 47/ The Court concluded that

"[w]e fail to see why, when they obtained a search warrant, they were obliged to execute it in a manner that might well have prevented Dunnings' arrest, so long as they did execute it within 10 days and at a time when the probable cause recited in the affidavit continued. 47(a)

The court reasoned that doubt as the heroin's presence at any given time did not negate the requisite probable cause either at the time the warrant was issued or executed. The court explicitly finds

<sup>45/</sup> Id. 382 F.2d at 886.

<sup>46/</sup> 425 F.2d 836 (2d Cir. 1969).

<sup>47/</sup> Id. at 841.

<sup>47(a)</sup> Id.

that "to permit agents to make the judgment that the averments of the affidavit are again satisfied, after a period of doubt, does not undercut the policy requiring an independent judicial determination of the existence of probable cause."<sup>48/</sup>

United States v. Nepstead<sup>49/</sup> involves a six day delay between issuance and execution of a search warrant. As in Dunnings, it appears that the agents checked the premises daily and waited until such time as they were sure that the contraband was on the premises and being manufactured before executing the search warrant. Noting that the meaning of the term "forthwith" "has been a subject of some controversy among the circuits,"<sup>50/</sup> the court acknowledges that "search warrants be executed with some promptness in order to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated."<sup>51/</sup>

The court explicitly adopts the Dunnings approach stating that

"forthwith" means any time within 10 days after the warrant is issued, provided that the probable cause recited in the affidavit continues until the time of execution, giving consideration to the intervening knowledge of the officers and the passage of time ... .<sup>52/</sup>

<sup>48/</sup> Id. at 840.

<sup>49/</sup> 424 F.2d 269 (9th Cir. 1970).

<sup>50/</sup> Id. at 271.

<sup>51/</sup> Id.

<sup>52/</sup> Id.

In United States ex rel Beal v. Skaff<sup>53/</sup> a state prisoner filed a writ of habeas corpus from his state conviction for possession of marijuana. The state search warrant had been obtained on the basis of an affidavit stating that a parcel believed to contain marijuana would be delivered to and be at the residence of the defendant. The court firmly states the importance of "forthwith" execution:

The reason for requiring that search warrants be executed "forthwith" is to assure that measure of judicial control over the search which the warrant procedure is intended to accomplish. The passage of an undue amount of time between issuance and execution of a warrant raises the danger that the property described in the affidavit would no longer exist on the premises to be searched, and that any property seized might therefore be other than that which was specified in the affidavit as grounds for issuing the warrant. <sup>54/</sup>

The approach taken by the Eighth, Second and Ninth Circuits in Spinelli v. United States, supra, United States v. Dunning, supra, and United States v. Nepstead, supra, is at odds with the general development of Fourth Amendment search and seizure law. In each case authorities watched the premises in question<sup>55/</sup> and intentionally delayed execution of the search warrant until the moment of their choosing. In both Dunning and Nepstead the court specifically approved of the practice of withholding execution of the warrant until a person or persons appeared on the premises. Although the Supreme Court has not

<sup>53/</sup> 418 F.2d 430 (9th Cir. 1969).

<sup>54/</sup> Id. at 433.

<sup>55/</sup> Spinelli: 2 hrs. and 10 minutes; Dunning: nine days; Nepstead: eight days.

directed itself specifically to that practice it has disapproved of the practice of allowing the authorities to choose when to execute an arrest warrant. In Crimel v. California<sup>56/</sup> the court adopted a rule restricting the permissible area of search incident to an arrest, recognizing that searches absent probable cause were arranged "by the simple expedient of arranging to arrest suspects at home rather than elsewhere."<sup>57/</sup> This jurisdiction has taken an even more restrictive view, holding that the "police strategem" of choosing the time and place of arrest is unlawful and will result in the suppression of all evidence seized, McKnight v. United States.<sup>58/</sup>

Delay in the execution of a search warrant until such time as additional unlawful items or people might be on the premises is even more dangerous. First, since search warrants speak to existing violations of the law, delay may either allow the unlawful items to disappear, or new items not contemplated by the warrant to appear.

Second, such discretion allows a search warrant to serve the purpose of an arrest warrant where probable cause for the latter warrant may not exist. Third, unlike arrest warrants,<sup>59/</sup> the Federal Rules of Criminal Procedure commands "forthwith" execution of search warrants.

<sup>56/</sup> 395 U.S. 752 (1969).

<sup>57/</sup> Id. at 767.

<sup>58/</sup> 87 U.S.App.D.C. 151, 183 F.2d 977 (1950).

<sup>59/</sup> Rule 4, FED.R.CRIM.P., does not require forthwith or prompt execution of arrest warrants. 4(b)(1) states: "It [the arrest warrant] shall command that the defendant be arrested and brought before the nearest available magistrate."

The requirement that the defendant establish "definite legal prejudice" in Spinelli, underscores the difficulty of that approach. Prejudice means prejudicial evidence which in turn is defined as that "evidence attributable to the delay."<sup>60/</sup> The court goes on to rule that "[U]njustified attempts by the police to prejudice the suspect by delay in execution do not provide standing unless the police are successful in their efforts."<sup>61/</sup> In view of a long line of cases which continually expanded the Fourth Amendment exclusionary rule so as to protect the rights of each citizen from unconstitutional police practices,<sup>62/</sup> it is difficult to believe that a court could seriously take this position. In effect the court is sanctioning and inviting - by not penalizing - illegal police conduct (delaying the execution of a warrant to search certain premises until a time selected by them which they feel may better aid the state) and announcing that the court will not interfere unless "the police are successful in their efforts" "to prejudice the suspect by delay in execution." Notwithstanding the severe invasions of privacy that search warrants permit,<sup>63/</sup> the Eighth Circuit apparently refuses to deter such illegal police conduct unless it is successful in obtaining evidence which would not have been found

<sup>60/</sup> Note 43, Supra at 886.

<sup>61/</sup> Note 43, supra at 886.

<sup>62/</sup> Beginning with Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court expanded the exclusionary rule until it finally applied to the states through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961). The exclusionary rule was found to be the only operable mechanism to curb abuses of the Fourth Amendment.

<sup>63/</sup> In Jone v. United States, 357 U.S. 493, 498 (1958) the Supreme Court "found it difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home." "The Amendment [Fourth] was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonist and had helped speed the movement for independence (footnote omitted)." Chimel v. California, 395 U.S. 761 (1969).

but for delay. It is not only a most unique reading of the protection the Fourth Amendment affords a citizen, but totally ignores the rationale of Mapp v. Ohio.<sup>64/</sup>

Equally troublesome is the approach taken in Dunnings and Nepstead. Unlike Spinelli, the Second and Ninth Circuits would allow at trial all evidence obtained when the search was conducted so long as probable cause existed at that time. Once a search warrant is obtained, the police are free to act when they please so long as in retrospect "the probable cause recited in the affidavit continues until the time of execution," giving consideration to the intervening knowledge of the officers and the passage of time ... ."<sup>65/</sup> This approach unashamedly reads the "forthwith" provision out of Rule 41, and permits the police to make an independent determination of probable cause so long as a warrant has issued and the tenth day has not passed. Both courts have totally ignored the fact that search warrants are directed at existing violations of the law, and direct seizure of currently existing items. Further, delay permits removal or continued concealment of the items in question, and provides the authorities with a ten day license with which to seize items not in existence at the time the warrant was issued and arrest individuals found on the premises.

Among the decisions in the other Circuits, only the Skaiff opinion which requires "forthwith" execution - to insure judicial control over

<sup>64/</sup> 367 U.S. 643 (1961).

<sup>65/</sup> United States v. Nepstead, note 49 supra at 271.

searches and to insure the property seized be that for which the warrant was issued - adheres to the principles the state courts have so scrupulously followed and the commands of the Supreme Court Fourth Amendment decisions.

E. "Forthwith": District of Columbia Analysis

The first case in the District of Columbia to interpret the term "forthwith" used in the context of a warrant was Seymour v. United States.<sup>66/</sup> The case dealt not with a search warrant, but with an arrest warrant which by its own terms commanded the officers to arrest Mrs. Seymour forthwith. Because she was out of town, the warrant was not served until the sixth day after issuance. The court in ruling on whether probable cause for issuance of the arrest warrant existed, stated in passing:

In the absence of any showing of prejudice to appellant we think there was sufficient compliance with the warrant. Forthwith is here equivalent to ... within a reasonable time; promptly and with reasonable dispatch." Webster's New International Dictionary (1946). <sup>67/</sup>

Unlike Rule 41(c), Rule 4 of the Federal Rules of Criminal Procedure which deals with arrest warrants does not require such warrants to command the officer to arrest forthwith. In fact, no time limitation is mentioned. The determination of probable cause which must be made before issuance of an arrest warrant is that a crime has been committed

<sup>66/</sup> 85 U.S.App.D.C. 366, 177 F.2d 732 (1949).

<sup>67/</sup> 85 U.S.App.D.C. 366, 177 F.2d 732.

by the person to be arrested. Once such a determination has been made the effect of time on that determination is not nearly as great as the effect of time on a determination that certain evidence is located at certain place. Although no mention is made of items seized at the time of Mrs. Seymour's arrest, prejudice, if it refers to anything, would refer to the practice of delaying the execution of an arrest warrant until the person to be arrested is in a place where the officers desire to search incident to the arrest. This "police stratagem" was restricted in the District of Columbia in 1950 by McKnight v. United States,<sup>68/</sup> and by the Supreme Court in Chimel v. California, 395 U.S. 752 (1969).<sup>69/</sup>

Nine years after Seymour, this Court first alluded to the "forthwith" requirement contained in Rule 41(c). Mitchell v. United States<sup>70</sup> involved a five day delay between issuance and execution of a search warrant. The delay was neither objected to at trial or raised as an error on appeal. Accordingly, the members of the panel agreed that the issue of faulty execution of the search warrant was not properly before the Court. However, in response to Judge Bazelon's views on the issue the two-member majority ruled that "the federal rule defines the word "forthwith" by limiting the time of the search to ten days after the

<sup>68/</sup> 87 U.S.App.D.C. 151, 183 F.2d 977 (1950).

<sup>69/</sup> 395 U.S. 752 (1969).

<sup>70/</sup> 103 U.S.App.D.C. 341, 258 F.2d 435 (1958).

issuance of the warrant."<sup>71/</sup>

Judge Bazelon in the concurring opinion discussed the reasons for the "forthwith" command in Rule 41(c):

A search warrant is based upon a judicial determination of the present existence of justifying grounds - i.e., at the time of issuance of the warrant. "The purpose is to seize the thing alleged to be at that time in the place to be searched, to prevent its removal or further concealment." State v. Guthrie, 1897, 90 Me. 448, 38 A. 368, 369. "Warrants are directed to existing violations of the law and not to violations which may come into existence in the future." Simmons v. State, Okla. Cr. 1955, 286 P. 296, 298 (emphasis in original)(footnotes omitted) <sup>72/</sup>

Judge Bazelon reasoned that if there is a delay in the execution of a warrant, the property to be seized may disappear, or the officer searching may seize property which came into existence after the warrant was issued. Hence the judicially-imposed requirement of speed which is a mandate and controls the officer who has no discretion, but must proceed to execute the search warrant as commanded at the earliest "reasonable" opportunity.

The mere fact of delay does not necessarily vitiate a search warrant. A number of circumstances, such as distance and weather conditions, may cause a court to consider a warrant to have been executed forthwith, despite some delay, State v. Guthrie, supra; but delay occasioned merely by the officer's assumption of authority to select the time of execution does vitiate the warrant. Even the magistrate has no right, once he has determined that the conditions for the issuance of a

<sup>71/</sup> 103 U.S.App.D.C. at 342, 258 F.2d at 437.

<sup>72/</sup> 103 U.S.App.D.C. at 343, 258 F.2d at 437.

warrant are in existence, to keep the suspect under surveillance and postpone execution of the warrant until such time as it may do the suspect the greatest harm. State v. Perkins, 1926, 220 Mo. App. 349, 285 S.W. 1021. Delay in either issuance or service, "when deliberate and made by the officers for the purpose of selecting their own time and for their own purpose, whether that purpose be to aid the state or the accused, [takes] away from them the power to issue and serve a search warrant." Id., 285 S.W. at page 1024; see also State v. Miller, 1932, 329 Mo. 855, 46 S.W. 2d 541. [footnotes omitted] 73/

Neither majority opinion nor the well reasoned concurring opinion hint that in addition to unreasonable delay, the defendant is required to establish that he was prejudiced by the admittedly illegal delay in the execution of the warrant. Indeed, the concurring opinion, relying on the reasoning of the early state opinions, underscores several reasons why failure of prompt execution vitiates an otherwise valid search warrant.

Eleven years later this Court in House v. United States,<sup>74/</sup> was presented with its next opportunity to deal with the "forthwith" provision of Rule 41(c). The warrant in House was executed 8 1/2 days after it had been issued. In remanding the case for a full hearing, this Court candidly acknowledged that "[t]he ambiguity between the "forthwith" command in Rule 41(c) and the ten day limitation in Rule 41(d) has not been squarely resolved in this juris-

74/ 134 U.S.App.D.C. 10, 411 F.2d 725 (1969), cert. denied, \_\_\_ U.S. \_\_\_ (1970).

diction."<sup>75/</sup> The court stated:

Certainly the outer limits of the period within which the search warrant may validly be executed and returned are delineated in Rule 41(d). And the plain intimation that "forthwith" means something may be perceived from what we said in Seymour, supra; reasonableness in point of time under the circumstances may provide the key. It would seem that there is no automatic touchstone, indeed sufficient compliance with the Rule may turn upon a showing of prejudice by the accused as Judge Edgerton observed in Seymour. [footnotes omitted] <sup>76/</sup>

The Court did not rely on the Mitchell opinion. Passing over Mitchell - in footnote form - because it dealt not an argument presented on appeal but "with discussion offered by our colleague"<sup>77/</sup> the Court instead relied on the older Seymour opinion. The Court adopting the proposition in Seymour that a defendant must establish prejudice regardless of the delay, apparently overlooked the fact that Seymour involved a question as to the validity of an arrest warrant not a search warrant. As noted earlier entirely different considerations are involved in warrants authorizing searches and those ordering arrests.

Without further guidance as to what, if anything, might constitute prejudice, and what constitutes an unreasonable delay, the District Court on remand, in House, [See Appendix A], ruled that the 8 1/2 day

<sup>75/</sup> 134 U.S.App.D.C. at 12, 411 F.2d at 727.

<sup>76/</sup> 134 U.S.App.D.C. at 13, 411 F.2d at 728.

<sup>77/</sup> 134 U.S.App.D.C. 12, n.10, 411 F.2d 727, n.10.

delay was not unreasonable and that defendant had made no showing of prejudice. The District Court Judge explicitly adopted a two-step test in order to determine whether a warrant has been properly executed. As a first-step the court looked to the length of delay, and found it reasonable inasmuch as a three day holiday intervened and the officers involved had a heavy workload.<sup>78/</sup> Although the second-step - requiring the defendant to prove prejudice from an unreasonable delay - need not have been reached, the court nevertheless ruled that defendant's reliance on automatic prejudice from the fact of delay was misplaced.<sup>79/</sup> The Court of Appeals in an unpublished opinion affirmed the District Court ruling.<sup>80/</sup>

The District of Columbia Court of Appeals relying on the House opinion held in Johnson v. United States,<sup>81/</sup> that a six day delay did not vitiate the warrant inasmuch as the defendant made no attempt to establish delay. Similarly, the District of Columbia Court of Appeals relied on the two-step of House to hold the eight day delay in execution herein unreasonable, but affirmed because defendant failed to establish prejudice.

<sup>78/</sup> Memorandum, United States v. House, Crim. No. 827-66 (D.C.D.C. Dec. 22, 1969, Judge Gasch) at 8,11.

<sup>79/</sup> Id. at 13.

<sup>80/</sup> House v. United States, (U.S.App.D.C. No. 21,389 and 23,903, April 9, 1969).

<sup>81/</sup> 255 A.2d 494 (D.C.App. 1969).

The current rule in the District of Columbia, based on the House opinion, still requires that a search warrant be executed within a reasonable period of time, but now requires the accused to establish prejudice in order to prevail at a suppression hearing. What about this approach?

First, in terms of sound judicial reasoning and reliance on precedent, House is clearly suspect. The prejudice requirement in House is extracted from the Seymour opinion which is an arrest not a search warrant case. Considerations of arrest and search warrants are entirely different. Prompt execution is critical in search warrant cases to insure that probable cause continues, and that the items to be seized are those named in the warrant. Once probable cause for an arrest is established, it does not diminish with time. The Federal Rules of Criminal Procedure (Rule 4 and 41) recognize this and command accordingly.

Second, the compelling analysis of the concurring opinion in Mitchell, although not binding, certainly should have been more carefully evaluated. That opinion, which recognized the approach taken by the states, suggests the importance of "forthwith" execution.

Third, the second-step of the test adopted in House which requires a defendant to establish prejudice from the delay in execution of a search warrant in order to prevail on a suppression motion, is a radical departure from existing Fourth Amendment analysis. Early

state decisions most certainly did not require such a showing,<sup>82/</sup> neither the majority or concurring opinion in Mitchell v. United States, supra, required such a showing, nor has this Court or the Supreme Court ever required such a showing in Fourth Amendment cases.

Evidence obtained under a wide variety of circumstances which constitute violations of the search and seizure provisions of the Fourth Amendment has been suppressed without a requirement that the defendant establish prejudice: where a warrantless arrest is made without probable cause;<sup>83/</sup> where an arrest is made pursuant to a warrant which was issued on the basis of insufficient factual assertions;<sup>84/</sup> where a warrantless search is made of fixed premises;<sup>85/</sup> where the affidavit in support of a search warrant fails to establish probable cause;<sup>86/</sup> where the affidavit in support of a search warrant fails to allege "fresh facts;"<sup>87/</sup> where the Rule 41(c) requirement that the warrant describe with particularity the items to be seized

<sup>82/</sup> See supra at pages

<sup>83/</sup> E.g. United States v. DiRe, 332 U.S. 581 (1948); Bynum v. United States, 104 U.S.App.D.C. 368, 262 F.2d 465 (1958).

<sup>84/</sup> E.g. Giordenello v. United States, 357 U.S. 480 (1958); Go Bart Importing Co. v. United States, 282 U.S. 344 (1931).

<sup>85/</sup> McDonald v. United States, 335 U.S. 451 (1948).

<sup>86/</sup> Aguilar v. Texas, 378 U.S. 108 (1964).

<sup>87/</sup> Sgro v. United States, 287 U.S. 206 (1932); Schoeneman v. United States, 115 U.S.App.D.C. 110, 317 F.2d 173 (1962).

is not met;<sup>88/</sup> where the Rule 41(c) requirement that the warrant describe with particularity the place to be searched is not met;<sup>89/</sup> where a search warrant is reissued after ten days without a new determination of the existence of probable cause;<sup>90/</sup> where Rule 41(c) is violated by the execution of a warrant at night without a showing of positivity in the warrant;<sup>91/</sup> where improper notice of authority and purpose was made under 18 U.S.C., Section 3109.<sup>92/</sup> The only showing required of a person seeking to suppress evidence is standing.<sup>93/</sup> That requirement has been relaxed in recent years.

Are any of the above provisions constitutionally more sacred than the requirement, embodied in Rule 41(c), that a search warrant be executed "forthwith" so that probable cause in existence at the time of the warrant's issuance will not have dissipated and items not in existence at the time the warrant was issued will not be seized? If not, should the "forthwith" command of Rule 41(c) be subject to a less rigid test, one which allows the government to act unreasonably (by an unreasonable delay in execution) yet prevail unless the defendant

<sup>88/</sup> Marran v. United States, 275 U.S. 192 (1927).

<sup>89/</sup> Keningham v. United States, 109 U.S.App.D.C. 272, 287 F.2d 126 (1960).

<sup>90/</sup> Sgro v. United States, 287 U.S. 206 (1932).

<sup>91/</sup> Jones v. United States, 357 U.S. 493 (1958).

<sup>92/</sup> Miller v. United States, 357 U.S. 301 (1958); Keningham v. United States, 109 U.S.App.D.C. 272, 287 F.2d 126 (1960).

<sup>93/</sup> Jones v. United States, 362 U.S. 257 (1960).

establishes prejudice. This approach leads to the same problems of application, discussed in the Spinelli decision, supra at page 20 and permits long delays with consequent abuses sanctioned in Dunnings and Nepstead, supra at page 23.

The entire thrust of the exclusionary rule is to deprive the authorities of the benefits of wrongful conduct.<sup>94/</sup> Yet, the House opinion invites such wrongful conduct by establishing a two-step test. This invitation is all the more dangerous because what constitutes prejudice and how a defendant would have to establish prejudice are in grave doubt.

Fourth, what constitutes prejudice under these circumstances is yet to be resolved by this Circuit. On remand, the District Court in the House case held that delay did not create automatic prejudice. Citing Spinelli, the Court stated that "he must point to some ascertainable prejudice which he has suffered because of the delay."<sup>95/</sup> The District of Columbia Court of Appeals in Johnson<sup>96/</sup> and this case also ruled that delay does not create automatic prejudice.

Unless "prejudice" is a requirement which the defense can never establish, it must mean that a defendant need show that items obtained

<sup>94/</sup> Mapp v. Ohio, 367 U.S. 643 (1961).

<sup>95/</sup> Memorandum, United States v. House, Crim. No. 827-66 (D.C.D.C. Dec. 22, 1969, Judge Gasch) at 13.

<sup>96/</sup> 255 A.2d 494 (D.C.App. 1969).

in the search, appeared at the scene of the search either subsequent to the day the warrant was issued, or subsequent to the time the delay became unreasonable. In either case the defendant would be required to take the stand at the suppression hearing, forego his Fifth Amendment privilege, and testify as to what arrived when. Notwithstanding the protection afforded by the decision of Simmons v. United States<sup>97/</sup> and Bailey v. United States,<sup>98/</sup> a defendant would be required to take the stand and admit to knowledge concerning the items seized.<sup>99/</sup>

Anomolously, the unfortunate passerby arrested incident to a search, would be unable to ever illustrate prejudice, for he would be without knowledge of any of the circumstances necessary to establish prejudice. So too would persons, like appellant, who deny that the items seized came from the premises searched.

Fifth, prejudice occurs automatically when the delay is unreasonable. Rule 41(c) commands "forthwith" execution. It is not modified by a prejudice requirement. Any search not conducted "forthwith" (i.e. in a reasonable period of time) is per se illegal. Failure to execute a search warrant in a timely manner enhances the possibility

<sup>97/</sup> 390 U.S. 377 (1968).

<sup>98/</sup> 128 U.S.App.D.C. 354, 389 F.2d 305 (1967).

<sup>99/</sup> As to matters other than guilt, the government may impeach the defendant by use of the suppression hearing transcript. The scope of permissible impeachment by use of the defendant's prior testimony appears to be an open question. See e.g. Walder v. United States, 347 U.S. 62 (1954); Tate v. United States, 109 U.S.App.D.C. 13, 283 F.2d 377 (1960).

that probable cause has dissipated, that the items to be seized are removed or retained, and that the items seized are not those contemplated in the warrant. Mitchell v. United States, (concurring opinion).

Sixth, allowing the authorities to defer execution of a search warrant for an unreasonable period of time, and then placing the burden of establishing prejudice on the accused, permits the police to exercise full discretion in the performance of a ministerial function,<sup>100/</sup> and permits them to search when they so choose. McKnight v. United States,<sup>101/</sup> prohibits this tactic in the arrest setting and logically applies to searches.

Seventh, requiring the accused to establish prejudice when the authorities have acted unreasonably is a step-back from the doctrine of utilizing suppression of evidence as a way to curb police violations of the Fourth Amendment.

Finally, this approach reads the "forthwith" provision out of Rule 41(c) by permitting unreasonably delayed searches to go unchecked particularly since a showing of prejudice by the accused can seldom be made.

#### F. Summary

In the instant case a delay of eight days occurred before the

<sup>100/</sup> See Contra State v. Guthrie, 99 Me. 448, 38 A. 368 (1897); and Mitchell v. United States, 103 U.S.App.D.C. 341, 258 F.2d 435 (1958).

<sup>101/</sup> 87 U.S.App.D.C. 151, 183 F.2d 977 (1950).

search warrant was executed. From the record it does not appear that the premises in question was "staked out" during the eight day period. [Tr.A.1-29]. The only evidence introduced by the government to explain the delay was that: "In the course of police work we have other things to do. I serve them in order as I get them, more or less ... No., I didn't put it off. I take it in sequence. I've got other duties." [Tr.A.24-25]. Properly, the District of Columbia Court of Appeals found that the eight day delay was unreasonable. "This testimony hardly amounts to the requisite showing of "reasonableness in point of time ... ." <sup>102/</sup> Yet, the Court relying on Seymour and House held that the appellant had shown no prejudice, "although appellant was not precluded by the trial court from demonstrating the prejudicial effect of delay in execution of the warrant [footnote omitted] ... ." <sup>103/</sup> and consequently the trial court ruling had to be affirmed. How could appellant have made a showing of prejudice in this case? At footnote 7 of its opinion the District of Columbia Court of Appeals recognizes that appellant claimed he was "framed" and that the weapon was not found on the premises. In light of this testimony it is submitted that appellant could never establish prejudice.

If the District of Columbia Court of Appeals is correct and the House opinion does require the appellant to establish prejudice even when the execution of the search warrant was unreasonably delayed by

<sup>102/</sup> 263 A.2d at 655.

<sup>103/</sup> Id.

the authorities, then that opinion: (1) represents a radical departure from the general development of Fourth Amendment law,<sup>104/</sup> and the approach of the state courts;<sup>105/</sup> (2) overlooks the constitutional dimensions of the "forthwith" requirement in Fourth Amendment search and seizure law;<sup>106/</sup> (3) ignores the independent significance of the Rule 41(c) "forthwith" requirement;<sup>107/</sup> and (4) imposes a burden few, if any, individuals can surmount. If the District of Columbia Court of Appeals is in error, and the appellant need not show prejudice, then that decision must be reversed and the search held unlawful inasmuch as the eight day delay was found to be unreasonable.

#### CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

\_\_\_\_\_  
Laurence B. Finegold

\_\_\_\_\_  
Larry J. Ritchie

<sup>104/</sup> See n.61-64, 83-93 and accompanying text as to the reasons for exclusion and the areas in which the exclusionary ruling has been sanctioned.

<sup>105/</sup> See state cases law development n.21-41 and accompanying text.

<sup>106/</sup> See Mitchell v. United States, n.7-73 and accompanying text; State v. Guthrie at n.24-29 and accompanying text; United States ex rel Beal v. Skaff, n.53-54 and accompanying text.

<sup>107/</sup> See statutory history at n.13-20.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA )

v. )

FLETCHER HOUSE )

Criminal No. 827-66

Court of Appeals

No. 21,389

FILED

Dec. 22, 1969

MEMORANDUM

ROBERT M. STEARNS  
CLERK

This matter came on for hearing upon remand from the Court of Appeals for an exploration by this Court of the circumstances of the delay between the issuance of the search warrant and its execution and for consideration of whatever showing of prejudice defendant may offer.

Prior to trial, defendant moved to suppress evidential use of a glassine envelope containing 65 capsules of heroin which had been thrown out of a window by him during the search and subsequently recovered by the agents. The warrant, which had been issued on May 25, 1966, was executed on June 2, 1966. On appeal, defendant argued that the search and seizure were illegal because the warrant was not executed "forthwith" as required by Rule 41(c), Fed. R. Crim. P. The Government, on the other hand, asserted that Rule 41(d), which provides that a warrant may be executed and returned only within ten days after the date of its issuance, defines "forthwith" and validates any search within the ten-day period.

Rejecting the Government's formulation, the Court of Appeals held that the "forthwith" requirement of Rule 41(c)

APPENDIX "A"

has a meaning independent of Rule 41(d), and that Rule 41(d) merely delineates the outer limits within which a search warrant may be validly executed and returned. Hence, even if a warrant is executed within the ten-day period, the search may nevertheless be defective because not executed "forthwith." House v. United States, \_\_\_ U.S.App.D.C. \_\_\_, 411 F.2d 725 (1969).

The Court of Appeals indicated that "reasonableness in point of time under the circumstances may provide the key" to the application of the "forthwith" standard in particular cases. However, unreasonable delay, without more, may not vitiate the legality of a search, for the Court also noted that "sufficient compliance with the Rule [41(c)] may turn upon a showing of prejudice by the accused . . . ." House v. United States, supra, at 728. Accordingly, the Court remanded "solely for purposes of . . . supplemental exploration of the circumstances of the delay and of whatever showing [defendant] may offer as to possible prejudice . . . ." Id.

"Reasonableness in Point of Time Under the Circumstances"

The purpose of the "forthwith" requirement is to assure that probable cause, which must exist when the warrant is issued, also exists when it is executed, Sgro v. United States, 287 U.S. 206 (1932); Mitchell v. United States, 103 U.S.App.D.C. 341, 258 F.2d 435 (1958). Obviously, the more expeditiously a warrant is executed, the greater the safeguard against those dangers. Accordingly, the officer

executing the warrant does not have discretion to delay execution until the most convenient time, but must execute it within a reasonable time. Furthermore, because police officials are in a better position than the defendant to explain the reasons for the delay, and also because the proceeding by search warrant is a drastic one, warranting liberal construction in favor of the individual, Sgro v. United States, supra, at 210, it is appropriate to place upon the Government the burden of explaining any delay.

Initially, counsel for defendant has raised questions concerning the proper scope of the Court's inquiry in this remand proceeding. First, he urges that any delay caused by factors within the "control" of law enforcement officials should be held unreasonable. He asserts that police work load and staff shortages are not proper subjects of consideration.

The thrust of defense counsel's contention is that one's constitutional rights should not be abridged merely because the resources necessary for their complete observance are not available. It is by no means certain, however, that questions of resource availability are irrelevant to the scope of constitutional rights. For example, the Sixth Amendment guarantees every defendant the right to a speedy trial in order to assure that he will be able adequately to prepare his defense. However, the Court of Appeals has consistently recognized that the right to a speedy trial

cannot be defined without reference to the resources available to the Government and the Court. In Smith v. United States, No. 22,157 (D.C. Cir. May 7, 1969), at 5, Judge Leventhal said,

There is at present . . . an unusual strain upon prosecutorial and judicial resources. The legislature has been apprised of the problem, and we may appropriately accommodate our doctrines to permit time for provision of resources necessary to dispose of criminal cases without denial of fundamental rights.

If considerations of resource availability were completely irrelevant to the instant question, there would be no justification even for a rule permitting forthwith execution. The proper rule would require immediate execution. Such a standard, however, would ignore the extent to which a rising crime rate has taxed available resources, and would seriously undermine law enforcement efforts. To implement such a rule, police officials would have to divert from otherwise useful functions enough officers to execute immediately the maximum number of warrants which might be obtained during a period of time. The purpose underlying Rule 41(c) - elimination of excessive police discretion - is adequately served by a rule which recognizes the administrative problems of law enforcement officials but which, at the same time, requires the Government to justify by affirmative proof delay in execution of a search warrant.

## Prejudice

Defense counsel has also raised a question whether unreasonable delay, without more, is sufficient to invalidate a search. He argues that a defendant is constitutionally prejudiced whenever he is subjected to a search conducted an unreasonable time after the warrant is issued, because the police are then acting not at the direction of the magistrate, but at their own discretion. However, in every case of this type there will have been at least one judicial determination of probable cause. Consequently, the danger of arbitrary police action is considerably less than where, for example, the police have never applied for a warrant. Moreover, defense counsel's position would prove unworkable in practice, for it would place upon the officials charged with executing the warrant the burden of deciding when an unreasonable time has elapsed. Furthermore, any residual threats to privacy are further ameliorated by the absolute ten-day limitation of Rule 41(d). If more than ten days elapse, a new warrant must be secured, even though abundant probable cause still may exist.

Accordingly, even if a search is executed after an unreasonable delay, the defendant must point to some ascertainable prejudice which he has suffered because of the delay in order to prevail on his motion to suppress. See Spinelli v. United States, 382 F.2d 871, 886 (8th Cir. 1967), rev'd on other grounds, 393 U.S. 410 (1968);

Johnson v. United States, 255 A.2d 494 (D.C. Mun. App. 1969).

Insofar as Rule 41(c) attempts to deter searches when probable cause no longer exists, and to prevent the use of search warrants for purposes not contemplated by the warrant, the Court's primary inquiry should be directed toward determining whether these types of abuse exist. Hence, unless the defendant can demonstrate (1) that the observations which supported the magistrate's original finding of probable cause would not have supported a finding of probable cause at the time the search was executed, or (2) that the officers delayed execution of the warrant in order to achieve a purpose or purposes not contemplated by the warrant, his motion to suppress must be denied.

Therefore, when a defendant moves to suppress evidence on the ground that the search was not carried out "forthwith," a two-step inquiry is required:

(1) The Government must affirmatively demonstrate that the delay was not unreasonable. Logistical and manpower problems of law enforcement officials, weather and traffic conditions, distance to the premises, and considerations of personal safety all properly bear upon the reasonableness of the delay.

(2) If the Government fails to establish that the warrant was executed forthwith, it does not necessarily follow that the evidence must be suppressed. The defendant must, in addition, demonstrate that he has suffered some prejudice which is attributable to the delay.

Having considered the testimony received in the three hearings held on this matter, and the proposed findings of fact submitted by the respective parties, the Court, pursuant to the remand order of the Court of Appeals makes the following:

FINDINGS OF FACT

1. In May of 1966, the Washington Office of the Federal Bureau of Narcotics consisted of eight agents. One agent was in undercover status during most of that period. Consequently, he was not available to obtain and execute arrest and search warrants relating to traffic in illicit drugs.

2. The seven agents available to apply for and execute warrants worked in teams. Each team was largely responsible for all arrest and search warrants which it secured.

3. The team to which Agent Gary Worden was assigned in May, 1966, consisted of three agents. The other two members of his team were Agents Ruhl and Maliska.

4. The Federal Bureau of Narcotics followed a procedure of working together with local police officials in executing search warrants. Normally, agents of the Bureau sought to execute search warrants either in the evening or early in the morning, in order to avoid being detected when approaching the premises to be searched.

5. It was also a normal practice of the Federal Bureau of Narcotics in May, 1966, to attempt to execute any outstanding arrest warrants prior to executing outstanding search warrants in order to forestall possible flight of the accused persons.

6. On May 25, 1966, sometime after 2:30 P.M., Agent Gary Worden of the Federal Bureau of Narcotics appeared before the United States Commissioner and secured arrest warrants for the following five individuals:

- (1) Carlton E. Bryant,  
Commissioner's Docket No. 21-336;
- (2) Roger Rucker,  
Commissioner's Docket No. 21-337;
- (3) Phillip Spriggs,  
Commissioner's Docket No. 21-338;
- (4) Earl S. Weaver,  
Commissioner's Docket No. 21-339;
- (5) Isabelle Harrison,  
Commissioner's Docket No. 21-340.

In addition, at the same time Agent Worden also secured a search warrant for premises at 1010 N Street, Apartment 1-B. Defendant House was arrested during the execution of this warrant on June 2, 1966.

7. On May 27, 1966, Agent Worden secured three arrest warrants for the following individuals:

- (1) Frank Young;
- (2) Delores Justice; and
- (3) Virginia Stewart.

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- (1) Frank Young;
- (2) Delores Justice; and
- (3) Virginia Stewart.

8. May 25, 26, 27, and 31, and June 1 and 2, 1966, were normal working days for Agent Worden. On each of these days he was on duty for at least eight hours. His detailed daily logs reveal that he worked substantially more than eight hours on May 25, May 27, and June 2. He did not work during the Memorial Day weekend of May 28, 29, and 30. Agent Worden testified that he did not think any members of his team worked over the three-day holiday weekend.

9. Agent Worden's daily logs reveal that during the period May 25 through June 2, 1966, he and the other members of his team were occupied largely by efforts to execute the arrest warrants obtained on May 25 and 27, and other duties, including appearances in Court by Agent Worden on May 26 and May 31. Efforts directed to execution of the arrest warrants were substantial.

10. None of the arrest warrants secured by Agent Worden's team were executed during the period May 25 through June 2, 1966. However, two of the arrest warrants obtained on May 27 were executed during that period. The warrant for Delores Justice was executed on May 27, and the warrant for Frank Young was executed on May 31.

11. Execution of the search warrant for the premises at 1010 N Street commenced shortly after 8:00 P.M. on the evening of June 2, 1966. In executing the warrant, Agents Worden, Ruhl and Maliska were joined by Detectives Hankin and Bush of the Narcotics Squad, Metropolitan Police Department.

12. Agent Worden testified that nothing in his records indicated why the search warrant was not executed earlier, except that he was engaged in other assignments. The work load of the Washington Office was the most substantial problem. Agent Worden was unable to recall specifically whether logistical problems in getting together with Detectives Bush and Hankins contributed to the delay. On the other hand, the vicinity of 1010 N Street is an area where warrants are normally executed only at night in order to promote safety and to forestall possible flight of accused persons or disposition of items specified in search warrants.

13. Following execution of the search warrant at 1010 N Street, processing of items seized on the premises and of individuals arrested continued until 2:00 A.M. on the morning of June 3, 1966.

#### CONCLUSIONS OF IAW

1. The United States Court of Appeals remanded this matter for the purpose of an inquiry by this Court into "the circumstances of the delay [of eight and one-half days in execution of a search warrant for premises on which defendant was arrested] and . . . whatever showing the [defendant] may offer as to possible prejudice . . . ." Defendant's conviction is to stand or fall in accord with this Court's conclusions.

2. Reasonableness in point of time under the circumstances provides the test against which the eight and one-half days delay in execution must be measured.

3. The Government has the burden of going forward with evidence to demonstrate that the delay was not unreasonable under the circumstances.

4. The Federal Bureau of Narcotics' practice of having its agents work in teams, with each team being responsible for warrants obtained by its members, is reasonable.

5. The Bureau's policy of executing warrants in the area of 1010 N. Street only at night or in early morning also is reasonable.

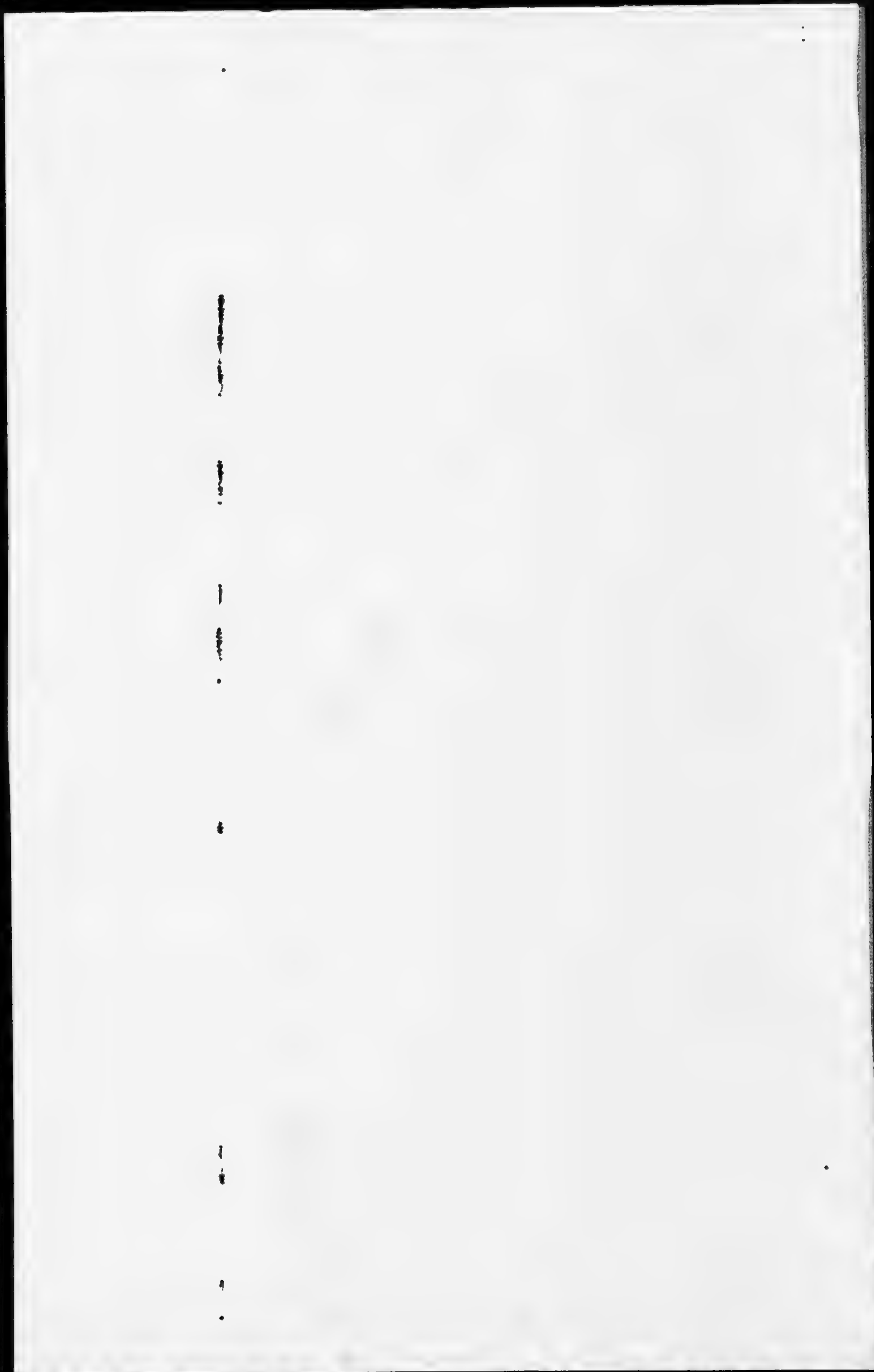
6. In addition, the Bureau's policy of giving priority to the execution of outstanding arrest warrants is not unreasonable.

7. Although a total of eight and one-half days elapsed before the warrant was executed, the Government must account for only five and one-half days inasmuch as the members of Agent Worden's team were not on duty during the three-day Memorial Day weekend of May 28, 29 and 30. The Court is disinclined to hold that it was unreasonable for the Bureau of Narcotics to give its agents the holiday weekend off. Certainly law enforcement officials, as well as other persons, are entitled to periodic respites from their normal work routine. This seems especially true in Agent Worden's case; for he had worked substantially more than eight hours on two of the three days preceding the weekend.

8. With respect to the remaining five days, the Court believes the Government has satisfied its burden of

explanation. Throughout the period in question, Agent Worden and the other members of his team were substantially occupied with executing several outstanding arrest warrants, in addition to their other assigned duties. Priority was given to the execution of these arrest warrants in accordance with established Bureau policy. Alternative resources did not exist to allow execution of the search warrant in a more timely fashion. Moreover, experience in this neighborhood indicated that the warrant involved here could be executed only at night. However, on two of the five available nights - May 25 and May 27 - Agent Worden was occupied with other duties. Therefore, in reality, only three nights were available.

Furthermore, the Court cannot ignore the logistical difficulties involved in a search of this type. In the first place, members of the Metropolitan Police Department were to participate in the search. This was a reasonable practice. Moreover, execution of the warrant was a matter of considerable complexity in and of itself. It involved tying up a considerable number of agents for several hours. Therefore, execution could not be undertaken merely on the spur of the moment. For example, in this case a total of five agents and officers participated in executing the warrant, and the total operation, including processing of the items seized and individuals arrested, consumed a period of almost six hours. In such circumstances law enforcement





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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief has been personally served at the Office of the United States Attorney, Appellate Division, United States District Courthouse, Washington, D.C., this 23rd day of December, 1970.

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LAURENCE B. FINEGOLD

BRIEF AND APPENDIX FOR APPELLEE

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,242

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JAMES E. CURTIS, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

---

APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

---

THOMAS A. FLANNERY,

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DLC A No. 5016

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED MAR 11 1951

CLERK OF COURT

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\*Cases chiefly relied upon are marked by asterisks.

(I)

### ISSUES PRESENTED\*

In the opinion of appellee, the following issues are presented:

I. Where the search warrant was executed eight days after it was issued, and where that eight-day delay was the result of the police having many other duties to perform and thus was not purposeful or deliberate, was the warrant executed "forthwith" within the meaning of Rule 41(d), FED. R. CRIM. P.?

II. Did appellant sustain his burden of showing prejudice resulting from the asserted failure of the police to execute the warrant "forthwith"?

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\* This case has not previously been before this Court.



# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,242

---

JAMES E. CURTIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

*APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS*

---

**BRIEF FOR APPELLEE**

---

## COUNTERSTATEMENT OF THE CASE

Appellant was charged in the Court of General Sessions by information on February 28, 1969, with possession of implements of crime and with unlawful possession of a pistol, in violation of 22 D.C. Code §§ 3601 and 3203, respectively. After unsuccessful motions to suppress the evidence and dismiss the information heard on March 28 and April 9, 1969, before the Honorable Tim Murphy, appellant proceeded to trial by jury before the Honorable John J. Malloy on April 10. Judge Malloy granted appellant's motion for judgment of acquittal on the charge of possession of implements of crime. The jury found appellant guilty of the remaining count of unlawful possession of a pistol. Appellant was sentenced to 360 days in jail, to run consecutively to other sentences appellant might have to serve. The case was appealed to the District of Colum-

bia Court of Appeals. On April 7, 1970, that court affirmed appellant's conviction. *Curtis v. United States*, 263 A.2d 653 (D.C. Ct. App. 1970). Appellant petitioned this Court for allowance of an appeal from the judgment of the District of Columbia Court of Appeals, and on July 2, 1970, this Court granted his petition.

Officer James Reed obtained a search warrant from the United States Commissioner two days after an alleged sale of narcotics occurred on February 17, 1969, from the premises at 1212 Maple View Place, S.E., Apartment 103 (Tr. I 22-25).<sup>1</sup> Entry was properly made into the apartment, where Officer Reed and his four accompanying officers found appellant, standing next to the bed with his hands under the mattress, and Linda Sullivan, lying nude on the bed. A search beneath the mattress where appellant had concealed his hands revealed a .22 caliber pistol. On top of the chest of drawers in the bedroom the officers found a water pipe used for smoking marijuana and a water bowl with marijuana seeds and what appeared to be burned marijuana in it (Tr. III 7-17).

Appellant testified at the first hearing on the motion to suppress and at trial, and on both occasions he denied that the pistol had been found in his apartment; rather, he claimed to be a victim of a police "frameup" resulting from his failure to work with the police as an informant on the narcotics underworld. Appellant admitted at the pre-trial hearing that he was standing next to the bed, but at trial he placed himself in the bed with his female companion. Miss Sullivan, the companion who listed apartment 103 as her residence, disavowed ever having seen the pistol (Tr. I 4-8; Tr. III 37, 48-53).

Savannah Gillis, a lifelong friend of appellant, testified that on the night in question the police grabbed him for no apparent reason from the street in front of appellant's apartment, told him that they had been looking for him, and threw him through the plate glass entrance door to appellant's apartment building. Gillis saw one of the officers flash the pistol which was re-

<sup>1</sup>"Tr. I" and "Tr. II" refer to the transcripts of the first and second pre-trial hearings on the motion to suppress, respectively. "Tr. III" refers to the transcript of the trial.

portedly seized later from appellant's apartment.<sup>2</sup> The police did not arrest Gillis (Tr. II 18-26, Tr. III 40-47).

Officers Horace M. Parker, Brian Gaines and James Reed were called by the Government in rebuttal at trial. They testified that Gillis had been following them and was detained at the entrance to the apartment while the search warrant was executed, and that the pistol in question was seized from appellant's apartment and was not part of a pre-arranged scheme to "get" appellant (Tr. III 53-70).

#### ARGUMENT

**I. The execution of the search warrant eight days after its issuance was within the statutory time limit and did not invalidate the seizure of the gun. (Tr. I 24-25)**

Rule 41, FED. R. CRIM. P., provides in pertinent part:

(c) *Issuance and Contents.*—A [search] warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. . . . It shall command the officer to search forthwith the person or place named for the property specified. . . .

(d) *Execution and Return with Inventory.*—The warrant may be executed and returned only within 10 days after its date. . . .

Appellant reads the Rule 41 (c) "forthwith" requirement apart from the Rule 41 (d) definition of "forthwith." He goes to great lengths in attempting to define "forthwith" without ever really doing so. Such effort seems most wasteful, for the authors of the rule have already defined it as that period of time within ten days of the issuance of the search warrant in which execution of the warrant is made. 5 ORFIELD, CRIMINAL PROCEDURE

<sup>2</sup> Appellant testified that he first saw the pistol at the Eleventh Precinct when Officer Reed pulled it from a filing cabinet, showed it to appellant and told him: that if he did not cooperate and become an informant, then the pistol would be used against him as having been seized from his apartment. Appellant was previously convicted of robbery in 1957 and had seven years' backup time to serve. Consequently, he could not possess a pistol in his home. Appellant's theory was that when he balked at becoming an informant, he became the victim of a "frameup" (Tr. III 49-53).

UNDER THE FEDERAL RULES § 41:44 (1967). This Court in *Mitchell v. United States*, 103 U.S. App. D.C. 341, 258 F.2d 435 (1958), has so held:

While it is true that Rule 41 (c) of the Federal Rules of Criminal Procedure provides that a search warrant "shall command the officer to search forthwith the person or place named for the property specified," subsection (d) of the same Rule begins: "The warrant may be executed and returned only within 10 days after its date." Thus the federal rule defines the word "forthwith" by limiting the time of the search to ten days after the issuance of the search warrant.

*Mitchell, supra*, 103 U.S. App. D.C. at 342, 258 F.2d at 436, citing *Sgro v. United States*, 287 U.S. 206 (1932); *Munby v. United States*, 2 F.2d 56 (1st Cir. 1924).

This Court remanded the case of *House v. United States*, 134 U.S. App. D.C. 10, 411 F.2d 725 (1969), which on its facts is similar to this case, for the trial court to determine the circumstances surrounding the 8½-day delay in the execution of a search warrant. On remand the District Court found that the delay was excusable because the other duties of the agents involved precluded an earlier execution. The court reasoned<sup>3</sup> that, despite the delay, the purpose of the "forthwith" requirement of Rule 41 (c) has been effectuated in that the probable cause which existed at the issuance of the search warrant continued to exist 8½ days later when the warrant was executed. *United States v. House*, Crim. No. 827-66, opinion entered December 22, 1969, *aff'd*, D.C. Cir. No. 23,901, decided April 9, 1970, *cert. denied*, 399 U.S. 915 (1970).<sup>4</sup>

In the instant case the record reflects a continuing belief on the part of Officer Reed that probable cause still existed to execute the search warrant for appellant's apartment eight days after its issuance. Officer Reed testified that, after procuring the search warrant for the sale of narcotics on Febru-

<sup>3</sup> The court relied on *Sgro v. United States, supra*, and *Mitchell v. United States, supra*, to support its reasoning.

<sup>4</sup> For the convenience of the Court, we have reprinted both the District Court's opinion on remand and the affirming judgment as appendices to this brief, pp. 11, 20, *infra*.

ary 19, he did nothing more on the case until February 27, when he and four other officers executed it. In fact, Reed testified on cross-examination that he had no reason to believe anyone or anything was in the apartment at the time of execution that was not in the apartment at the time of the alleged sale. The entry was made on February 27, rather than on some earlier date, only because "[i]n the course of police work we have other things to do. I serve them in the order I get them, more or less. . . . I didn't put it off. I take it in sequence. I've got my other duties." (Tr. I 24-25). Such burdensome "other duties" are one of the reasons that Rule 41(d) provides a reasonable ten-day crutch upon which the police can lean in times of understaffing and overstraining of their forces.<sup>5</sup> The demands on the police are very much a consideration in any assessment of the reasons why the instant warrant was executed eight days after issuance, *People v. Fetsko*, 332 Ill. 110, 111, 163 N.E. 359, 360 (1928); see *Mitchell v. United States*, *supra*, 103 U.S. App. D.C. at 342, 258 F.2d at 436 (concurring opinion), and such demands on Officer Reed more than adequately demonstrate why he waited those eight days.<sup>6</sup> Simply stated, the

<sup>5</sup> In *Smith v. United States*, 135 U.S. App. D.C. 284, 286, 418 F.2d 1120, 1122 (1969), this Court recognized:

There is at present . . . an unusual strain upon prosecutorial and judicial resources. The legislature has been apprised of the problem, and we may appropriately accommodate our doctrines to permit time for provision of resources necessary to dispose of criminal cases without denial of fundamental rights.

Appellant hinges his "forthwith" argument almost entirely on the concurring opinion of Chief Judge Bazelon in *Mitchell*, *supra*. Appellant, like Judge Bazelon, defines the term "forthwith" more narrowly than the majority in *Mitchell*. See also *State v. Guthrie*, 90 Me. 448, 38 A. 368 (1897). Appellant fails to appreciate, however, that Chief Judge Bazelon's concern was with unexplained delay in executing the warrant and not with an explainable and acceptable reason for delay such as we have here. *Mitchell*, *supra*, 103 U.S. App. D.C. at 346, 258 F.2d at 440.

Additionally, we note that ten days is the "outer limit" of execution of the warrant. *House v. United States*, *supra*, 134 U.S. App. D.C. at 13, 411 F.2d at 728. The authors of the rule clearly meant that the police must have at least ten days in which to execute the warrant. Were this not the case, the courts would have reserved some of the ten days for the return of the warrant and would not have ruled as they have that the return of a warrant is a ministerial act which may be done within any reasonable time after its execution. *Evans v. United States*, 242 F.2d 534, 536 (6th Cir.), cert. denied, 353 U.S. 976 (1957); *Benton v. United States*, 70 F.2d 24 (4th Cir.), cert. denied, 292 U.S. 642 (1934).

police cannot exercise their discretion in delaying execution of the warrant till the most convenient time. They must execute the search warrant within a reasonable time, and any delay in such execution can and must be explained away by the Government, as was done in this case. See *United States v. House*, Appendix I, *infra*, p. 11.

Probable cause having still existed on February 27, Officer Reed having waited eight days solely because of the demands of his job, and execution of the search warrant having been made within the ten-day grace period provided in Rule 41(d), the search warrant was timely executed.<sup>7</sup>

## II. Appellant was not prejudiced by the delay in executing the search warrant. (Tr. I 4-8, 24-25; Tr. III 48-53).

Prejudice suffered from the delay in executing a search warrant is a very much a factor in determining whether the warrant was properly executed. An accused must show prejudice to him resulting from the delay before he can prevail on a claim of invalid execution. *House v. United States*, *supra*, 134 U.S. App. D.C. at 13, 411 F.2d at 728; *Spinelli v. United States*, 382 F.2d 871 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969); *Johnson v. United States*, 255 A.2d 494 (D.C. Ct. App. 1969). Appellant attempts to shirk that responsibility by relying on the *absence* of a prejudice test in various older state cases. The cases in the federal circuits, including this one, require an affirmative indication of prejudice. We submit that the federal authorities control.

It was upon this Court's *House* opinion, *supra*, and upon *Seymour v. United States*, 85 U.S. App. D.C. 366, 177 F.2d 732 (1949), and *Spinelli*, *supra*, that the District Court relied

<sup>7</sup> In *United States v. Dunning*, 425 F.2d 836, 841 (2d Cir. 1969), the court held that it was permissible for the police to deliberately withhold executing a search warrant for nine days in order that the defendant might be in the apartment when the entry was made. The court quite logically explained, "We fail to see why, when they obtained a warrant, they were obliged to execute it in a manner that might well have prevented [appellant's] arrest, so long as they did execute it within ten days and at a time when probable cause recited in the affidavit continued. See *Mitchell v. United States*, [*supra*]; but see *Spinelli v. United States* [*supra*], 382 F.2d at 885; *House v. United States*, [*supra*]." See *United States v. Newport*, 424 F.2d 269 (9th Cir. 1970).

in its remand ruling in *House*. See Appendix I, *infra*, p. 11. There the court set out a two-pronged test for determining whether a warrant had been properly executed.<sup>8</sup> Prejudice could be demonstrated by the defense by proof that (1) probable cause as it existed upon the issuance of the search warrant no longer existed at the time of execution, or (2) the officers were dilatory in serving the warrant for purposes extraneous to the warrant.<sup>9</sup>

Failure to meet this burden required denial of the motion to suppress. In the instant case Officer Reed testified that he had no reason to believe that apartment 103 was any different at execution of the warrant from the way it was at its issuance (Tr. I 24-25).<sup>10</sup> Appellant's defense was that the pistol was not his, was not taken from his apartment, but was, in effect, planted by the police in a "frameup" (Tr. I 4-8; Tr. III 48-53). On this record it is difficult to imagine how it could have made any difference if the warrant had been executed sooner. Appellant failed to meet his burden.<sup>11</sup>

Finally, appellant suggests that *House*, a search warrant case, was erroneously decided because it was based on *Seymour*, *supra*, an arrest warrant case, rather than the assertedly dispositive search warrant case of *Mitchell v. United States*. Appellant elaborates that the situation in *Seymour* was different because Rule 4, FED. R. CRIM. P., governs arrest warrants and contains no "forthwith" requirement for serving a warrant. Appellant further reasons that since there is no "forthwith" rule, time is not nearly so important in affecting the basis upon

<sup>8</sup> Under the court's test, the Government must demonstrate an absence of unreasonable delay, and the defense must show a suffering of prejudice.

<sup>9</sup> But see *United States v. Dunninga*, *supra*, 425 F.2d at 841.

<sup>10</sup> There is a strong possibility that the police would not have looked for and seized the now-challenged pistol had appellant not been standing with his hands under the mattress where the pistol was hidden when the police entered his apartment to search for narcotics (Tr. III 11).

<sup>11</sup> Appellant also argues that the requirement of proving prejudice breaches appellant's Fifth Amendment right not to testify. This issue has been decided contrary to appellant's position. *Simmons v. United States*, 390 U.S. 377 (1966); *Bailey v. United States*, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967).

which the arrest warrant was issued.<sup>12</sup> Consequently, appellant concedes that requiring a showing of prejudice can be justified in arrest warrant cases, as was done in *Seymour*.

Appellant then attempts to distinguish arrest warrant cases from search warrant cases on the theory that, because of the "forthwith" requirement of Rule 41 (c), time is the crucial factor.<sup>13</sup> Hence, says appellant, speed is a mandate in executing a search warrant, and failure to exercise such "forthwith" speed automatically offends his Fourth Amendment rights. What appellant fails to understand is that, while Rule 41 (c) gives a "forthwith" protection to an accused to protect him from purposeful police delay, Rule 41 (d) also gives to the police a ten-day grace period in which to meet the "forthwith" requirement. Thus Rule 41, read as a whole, balances private against public interest. The only way that the courts can learn of an offense to private rights is for the holder of such rights to come forward and point to the prejudice, just as appellant concedes must be done in arrest warrant cases. Such a burden must be on the individual aggrieved, since he is unique in his knowledge of just what prejudice he has suffered. There has been no showing of prejudice here by appellant, and his claim of error on that ground alone must fail.

#### CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,

*United States Attorney.*

JOHN A. TERRY,

ROBERT A. SHUKER,

WILLIAM S. BLOCK,

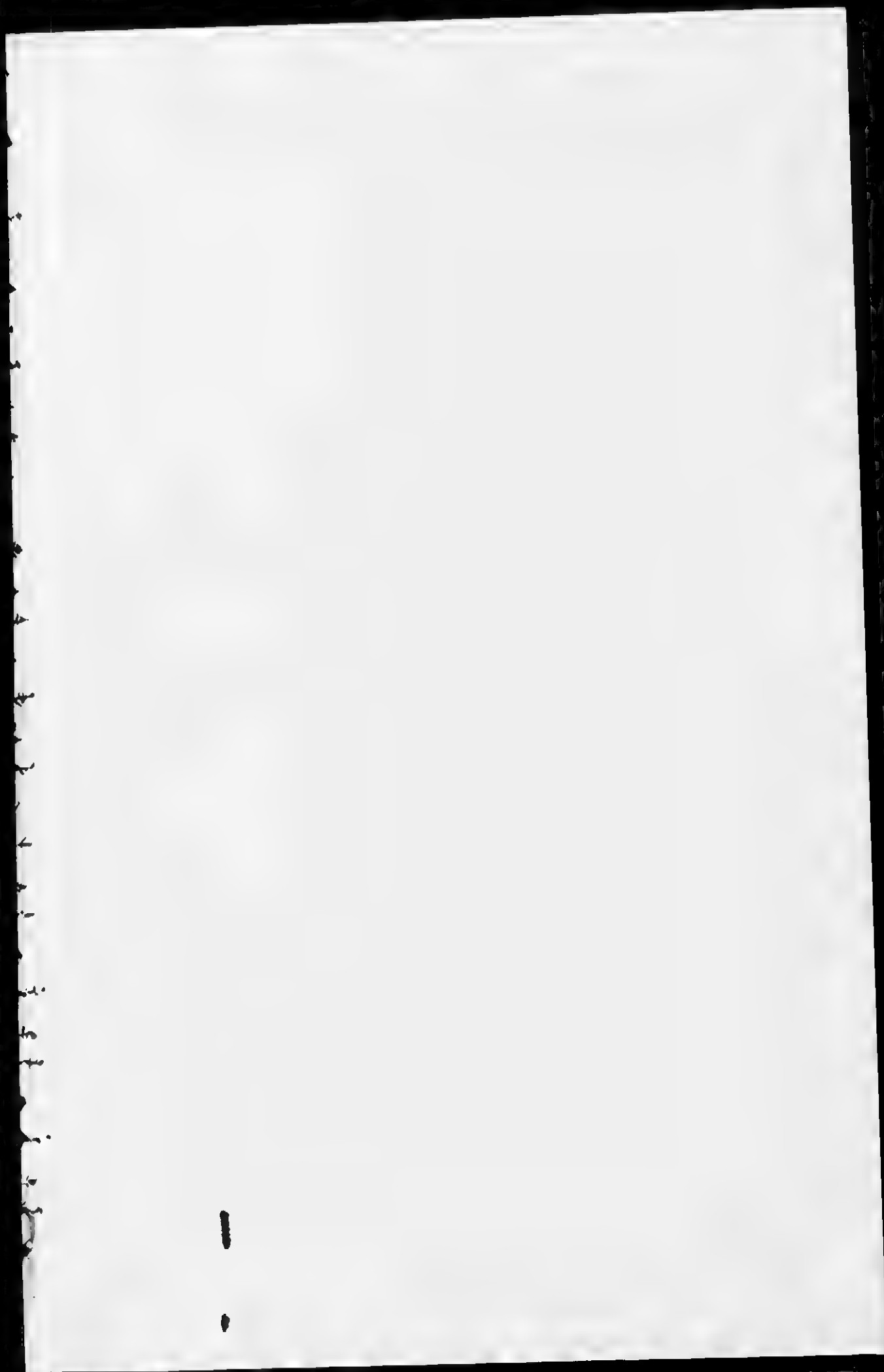
ROBERT C. CRIMMINS,

KENNETH MICHAEL ROBINSON,

*Assistant United States Attorneys.*

<sup>12</sup> Of course, *Seymour* held that an arrest warrant must be executed within a "reasonable time."

<sup>13</sup> Appellant explains that a search warrant is issued upon a showing that probable cause exists to search a dwelling for existing violations of the law and not for violations which may occur in the future.



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**APPENDIX**

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## APPENDIX I

[Filed December 22, 1969]

United States District Court for the District of Columbia

Criminal No. 827-66, Court of Appeals, No. 21.389

UNITED STATES OF AMERICA

v.

FLETCHER HOUSE

### MEMORANDUM

This matter came on for hearing upon remand from the Court of Appeals for an exploration by this Court of the circumstances of the delay between the issuance of the search warrant and its execution and for consideration of whatever showing of prejudice defendant may offer.

Prior to trial, defendant moved to suppress evidential use of a glassine envelope containing 65 capsules of heroin which had been thrown out of a window by him during the search and subsequently recovered by the agents. The warrant, which had been issued on May 25, 1966, was executed on June 2, 1966. On appeal, defendant argued that the search and seizure were illegal because the warrant was not executed "forthwith" as required by Rule 41(c), Fed. R. Crim. P. The Government, on the other hand, asserted that Rule 41(d), which provides that a warrant may be executed and returned only within ten days after the date of its issuance, defines "forthwith" and validates any search within the ten-day period.

Rejecting the Government's formulation, the Court of appeals held that the "forthwith" requirement of Rule 41(c) has a meaning independent of Rule 41(d), and that Rule 41(d) merely delineates the outer limits within which a search warrant may be validly executed and returned. Hence, even if a

warrant is executed within the ten-day period, the search may nevertheless be defective because not executed "forthwith." *House v. United States*, — U.S. App. D.C. —, 411 F.2d 725 (1969).

The Court of Appeals indicated that "reasonableness in point of time under the circumstances may provide the key" to the application of the "forthwith" standard in particular cases. However, unreasonable delay, without more, may not vitiate the legality of a search, for the Court also noted that "sufficient compliance with the Rule [41(c)] may turn upon a showing of prejudice by the accused . . . ." *House v. United States*, *supra*, at 728. Accordingly, the Court remanded "solely for purposes of . . . supplemental exploration of the circumstances of the delay and of whatever showing [defendant] may offer as to possible prejudice. . . ." *Id.*

*"Reasonableness in Point of Time Under the Circumstances"*

The purpose of the "forthwith" requirement is to assure that probable cause, which must exist when the warrant is issued, also exists when it is executed, *Sgro v. United States*, 287 U.S. 206 (1932); *Mitchell v. United States*, 103 U.S. App. D.C. 341, 258 F.2d 435 (1958). Obviously, the more expeditiously a warrant is executed, the greater the safeguard against those dangers. Accordingly, the officer executing the warrant does not have discretion to delay execution until the most convenient time, but must execute it within a reasonable time. Furthermore, because police officials are in a better position than the defendant to explain the reasons for the delay, and also because the proceeding by search warrant is a drastic one, warranting liberal construction in favor of the individual, *Sgro v. United States*, *supra*, at 210, it is appropriate to place upon the Government the burden of explaining any delay.

Initially, counsel for defendant has raised questions concerning the proper scope of the Court's inquiry in this remand proceeding. First, he urges that any delay caused by factors within the "control" of law enforcement officials should be held unreasonable. He asserts that police work load and staff shortages are not proper subjects of consideration.

The thrust of defense counsel's contention is that one's constitutional rights should not be abridged merely because the resources necessary for their complete observance are not available. It is by no means certain, however, that questions of resource availability are irrelevant to the scope of constitutional rights. For example, the Sixth Amendment guarantees every defendant the right to a speedy trial in order to assure that he will be able adequately to prepare his defense. However, the Court of Appeals has consistently recognized that the right to a speedy trial cannot be defined without reference to the resources available to the Government and the Court. In *Smith v. United States*, No. 22,157 (D.C. Cir. May 7, 1969), at 5, Judge Leventhal said,

There is at present . . . an unusual strain upon prosecutorial and judicial resources. The legislature has been apprised of the problem, and we may appropriately accommodate our doctrines to permit time for provision of resources necessary to dispose of criminal cases without denial of fundamental rights.

If considerations of resource availability were completely irrelevant to the instant question, there would be no justification even for a rule permitting *forthwith* execution. The proper rule would require *immediate* execution. Such a standard, however, would ignore the extent to which a rising crime rate has taxed available resources, and would seriously undermine law enforcement efforts. To implement such a rule police officials would have to divert from otherwise useful functions enough officers to execute immediately the maximum number of warrants which might be obtained during a period of time. The purpose underlying Rule 41(c)—elimination of excessive police discretion—is adequately served by a rule which recognizes the administrative problems of law enforcement officials but which, at the same time, requires the Government to justify by affirmative proof delay in execution of a search warrant.

#### *Prejudice*

Defense counsel has also raised a question whether unreasonable delay, without more, is sufficient to invalidate a search.

He argues that a defendant is constitutionally prejudiced whenever he is subjected to a search conducted an unreasonable time after the warrant is issued, because the police are then acting not at the direction of the magistrate, but at their own discretion. However, in every case of this type there will have been at least one judicial determination of probable cause. Consequently, the danger of arbitrary police action is considerably less than where, for example, the police have never applied for a warrant. Moreover, defense counsel's position would prove unworkable in practice for it would place upon the officials charged with executing the warrant the burden of deciding when an unreasonable time has elapsed. Furthermore, any residual threats to privacy are further ameliorated by the absolute ten-day limitation of Rule 41(d). If more than ten days elapse, a new warrant *must* be secured, even though abundant probable cause still may exist.

Accordingly, even if a search is executed after an unreasonable delay, the defendant must point to some ascertainable prejudice which he has suffered because of the delay in order to prevail on his motion to suppress. See *Spinelli v. United States*, 382 F.2d 871, 886 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1968); *Johnson v. United States*, 255 A.2d 494 (D.C. Mun. App. 1969). Insofar as Rule 41(c) attempts to deter searches when probable cause no longer exists, and to prevent the use of search warrants for purposes not contemplated by the warrant, the Court's primary inquiry should be directed toward determining whether these types of abuse exist. Hence, unless the defendant can demonstrate (1) that the observations which supported the magistrate's original finding of probable cause would not have supported a finding of probable cause at the time the search was executed, or (2) that the officers delayed execution of the warrant in order to achieve a purpose or purposes not contemplated by the warrant, his motion to suppress must be denied.

Therefore, when a defendant moves to suppress evidence on the ground that the search was not carried out "forthwith," a two-step inquiry is required:

- (1) The Government must affirmatively demonstrate that

the delay was not unreasonable. Logistical and manpower problems of law enforcement officials, weather and traffic conditions, distance to the premises, and considerations of personal safety all properly bear upon the reasonableness of the delay.

(2) If the Government fails to establish that the warrant was executed forthwith, it does not necessarily follow that the evidence must be suppressed. The defendant must, in addition, demonstrate that he has suffered some prejudice which is attributable to the delay.

Having considered the testimony received in the three hearings held on this matter, and the proposed findings of fact submitted by the respective parties, the Court, pursuant to the remand order of the Court of Appeals makes the following:

#### FINDINGS OF FACT

1. In May of 1966, the Washington Office of the Federal Bureau of Narcotics consisted of eight agents. One agent was in undercover status during most of that period. Consequently, he was not available to obtain and execute arrest and search warrants relating to traffic in illicit drugs.

2. The seven agents available to apply for and execute warrants worked in teams. Each team was largely responsible for all arrest and search warrants which it secured.

3. The team to which Agent Gary Worden was assigned in May, 1966, consisted of three agents. The other two members of his team were Agents Ruhl and Maliska.

4. The Federal Bureau of Narcotics followed a procedure of working together with local police officials in executing search warrants. Normally, agents of the Bureau sought to execute search warrants either in the evening or early in the morning, in order to avoid being detected when approaching the premises to be searched.

5. It was also a normal practice of the Federal Bureau of Narcotics in May, 1966, to attempt to execute any outstanding arrest warrants prior to executing outstanding search warrants in order to forestall possible flight of the accused persons.

6. On May 25, 1966, sometime after 2:30 P.M., Agent Gary Worden of the Federal Bureau of Narcotics appeared before

the United States Commissioner and secured arrest warrants for the following five individuals:

- (1) Carlton E. Bryant, Commissioner's Docket No. 21-336;
- (2) Roger Rucker, Commissioner's Docket No. 21-377;
- (3) Phillip Spriggs, Commissioner's Docket No. 21-338;
- (4) Earl S. Weaver, Commissioner's Docket No. 21-339;
- (5) Isabelle Harrison, Commissioner's Docket No. 21-340.

In addition, at the same time Agent Worden also secured a search warrant for premises at 1010 N Street, Apartment 1-B. Defendant House was arrested during the execution of this warrant on June 2, 1966.

7. On May 27, 1966, Agent Worden secured three arrest warrants for the following individuals:

- (1) Frank Young;
- (2) Delores Justice; and
- (3) Virginia Stewart.

8. May 25, 26, 27, and 31, and June 1 and 2, 1966, were normal working days for Agent Worden. On each of these days he was on duty for at least eight hours. His detailed daily logs reveal that he worked substantially more than eight hours on May 25, May 27, and June 2. He did not work during the Memorial Day weekend of May 28, 29, and 30. Agent Worden testified that he did not think any members of his team worked over the three-day holiday weekend.

9. Agent Worden's daily logs reveal that during the period May 25 through June 2, 1966, he and the other members of his team were occupied largely by efforts to execute the arrest warrants obtained on May 25 and 27, and other duties, including appearances in Court by Agent Worden on May 26 and May 31. Efforts directed to execution of the arrest warrants were substantial.

10. None of the arrest warrants secured by Agent Worden's team were executed during the period May 25 through June 2, 1966. However, two of the arrest warrants obtained on May 27

were executed during that period. The warrant for Delores Justice was executed on May 27, and the warrant for Frank Young was executed on May 31.

11. Execution of the search warrant for the premises at 1010 N Street commenced shortly after 8:00 P.M. on the evening of June 2, 1966. In executing the warrant, Agents Worden, Ruhl and Maliska were joined by Detectives Hankin and Bush of the Narcotics Squad, Metropolitan Police Department.

12. Agent Worden testified that nothing in his records indicated why the search warrant was not executed earlier, except that he was engaged in other assignments. The workload of the Washington Office was the most substantial problem. Agent Worden was unable to recall specifically whether logistical problems in getting together with Detective Bush and Hankins contributed to the delay. On the other hand, the vicinity of 1010 N Street is an area where warrants are normally executed only at night in order to promote safety and to forestall possible flight of accused persons or disposition of items specified in search warrants.

13. Following execution of the search warrant at 1010 N Street, processing of items seized on the premises and of individuals arrested continued until 2:00 A.M. on the morning of June 3, 1966.

#### CONCLUSIONS OF LAW

1. The United States Court of Appeals remanded this matter for the purpose of an inquiry by this Court into "the circumstances of the delay [of eight and one-half days in execution of a search warrant for premises on which defendant was arrested] and . . . whatever showing the [defendant] may offer as to possible prejudice. . . ." Defendant's conviction is to stand or fall in accord with this Court's conclusions.

2. Reasonableness in point of time under the circumstances provides the test against which the eight and one-half days delay in execution must be measured.

3. The Government has the burden of going forward with evidence to demonstrate that the delay was not unreasonable under the circumstances.

4. The Federal Bureau of Narcotics' practice of having its agents work in teams, with each team being responsible for warrants obtained by its members, is reasonable.

5. The Bureau's policy of executing warrants in the area of 1010 N Street only at night or in early morning also is reasonable.

6. In addition, the Bureau's policy of giving priority to the execution of outstanding arrest warrants is not unreasonable.

7. Although a total of eight and one-half days elapsed before the warrant was executed, the Government must account for only five and one-half days inasmuch as the members of Agent Worden's team were not on duty during the three-day Memorial Day weekend of May 28, 29 and 30. The Court is disinclined to hold that it was unreasonable for the Bureau of Narcotics to give its agents the holiday weekend off. Certainly law enforcement officials, as well as other persons, are entitled to periodic respites from their normal work routine. This seems especially true in Agent Worden's case; for he had worked substantially more than eight hours on two of the three days preceding the weekend.

8. With respect to the remaining five days, the Court believes the Government has satisfied its burden of explanation. Throughout the period in question, Agent Worden and the other members of his team were substantially occupied with executing several outstanding arrest warrants, in addition to their other assigned duties. Priority was given to the execution of these arrest warrants in accordance with established Bureau policy. Alternative resources did not exist to allow execution of the search warrant in a more timely fashion. Moreover, experience in this neighborhood indicated that the warrant involved here could be executed only at night. However, on two of the five available nights—May 25 and May 27—Agent Worden was occupied with other duties. Therefore, in reality, only three nights were available.

Furthermore, the Court cannot ignore the logistical difficulties involved in a search of this type. In the first place, members of the Metropolitan Police Department were to participate in the search. This was a reasonable practice. Moreover, execu-

tion of the warrant was a matter of considerable complexity in and of itself. It involved tying up a considerable number of agents for several hours. Therefore, execution could not be undertaken merely on the spur of the moment. For example, in this case a total of five agents and officers participated in executing the warrant, and total operation, including processing of the items seized and individuals arrested, consumed a period of almost six hours. In such circumstances law enforcement officials must be permitted some latitude in deciding when to carry out the search and to select a time when the others were reasonably available.

9. Accordingly, the Court concludes that, in the circumstances of this case, the delay of eight and one-half days in executing the search warrant was not unreasonable.

Because the delay was not unreasonable, the Court is not required to reach the question of what prejudice, if any, defendant might have suffered. In any event, defendant offered no evidence on the issue of prejudice, choosing to rest on his contention that, since the search was not conducted forthwith, he was automatically prejudiced. The Court rejects this position and on this record finds no prejudice.

/s/ OLIVER GASCH,  
*Judge.*

Date: December 20, 1969.

## APPENDIX II

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[Filed April 9, 1970]

United States Court of Appeals for the District of Columbia  
Circuit

(No. 21,389, 23,901, Criminal 827-66, September Term, 1969)

FLETCHER HOUSE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UNITED STATES OF AMERICA

v.

FLETCHER HOUSE, APPELLANT

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

Before: Danaher,\* Senior Circuit Judge; and McGowan and  
Tamm, Circuit Judges.

### JUDGMENT

These consolidated causes came before the court first on the record on appeal from the United States District Court for the District of Columbia in No. 21,389; and following hearings pursuant to remand in said cause, on the record as supplemented and the appeal thereupon filed in No. 23,901; and, after consideration of the memorandum of the District Judge, the Findings and Conclusions of Law therein set forth and of the original record; the court being satisfied that no sufficient cause had been shown which requires that this court set aside the

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\*Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

District Court's conclusion that the challenged delay "was not unreasonable"; and

it having appeared that a search warrant had validly issued, *United States v. Ventresca*, 380 U.S. 102, 180 (1965) commanding a search of premises of one Freddy Perry which premises, frequented by narcotics users, and so in use even as the executing officer announced their presence and their purpose, had become "a dope pad" as defense counsel had argued; and it having further appeared that from within the premises this appellant at that time forced open a window screen and dropped outside a package containing 65 capsules of heroin while the window and the appellant were under surveillance by agents outside; and,

after noting that the appellant although accorded an opportunity pursuant to our order of remand in No. 21,389, "offered no evidence on the issue of prejudice," the District Judge concluded that there was no prejudice and accordingly rejected appellant's contention that "he was automatically prejudiced," See No. 32527, *United States of America v. Dunnings*, — Fd.2 —, 2 Cir. November 17, 1969, slip opinion 534, 535, and Circuit Judge Smith concurring, slip opinion 536;

Now, after consideration of the foregoing, of this Court's opinion, U.S.App.D.C. , 411 Fd.2 725 (1969) and of *United States of America v. Dunnings*, *supra* and of the cases cited therein, in light of the Memorandum of the District Judge, the Findings of Fact and Conclusions of Law therein,

It is by the Court ORDERED, that the judgment of conviction is affirmed.

*Per Curiam.*

Dated: April 9, 1970.